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Supreme Court of Nebraska

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HENRY P. STODDART

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For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1934

GEORGE I. PARKER, RECEIVER, APPELLEE, V. LOUIS W. LUEHRMANN, ADMINISTRATOR, ET AL., APPELLANTS.

FILED JANUARY 26, 1934. No. 28731.

1. **Executors and Administrators:** CONTINGENT CLAIMS. "A contingent claim against an estate, mentioned in section 30-701, Comp. St. 1929, is one where the liability depends upon some future event, which may or may not happen, and which, therefore, makes it wholly uncertain whether there ever will be a liability. In the case of a contingent claim, the contingency does not relate simply to the amount which may be recovered, but to the uncertainty whether any amount will ever become due." *In re Estate of Bolton*, 121 Neb. 737.
2. **Courts.** When the receiver of an insolvent bank, duly appointed by the district court, lodges a contingent claim for double stock liability against the estate of a deceased stockholder, the filing of such claim does not vest the county court with exclusive jurisdiction over it, and deprive the receiver of the right to proceed in the district court to determine the liability of the estate of such deceased stockholder, and make the claim absolute for allowance in the county court. The administrator is a proper party defendant for that purpose. *Brownell v. Anderson*, 117 Neb. 652.
3. **Executors and Administrators.** "The trust of an administrator or executor is a continuing one, and a decree of final accounting does not destroy the relationship of such officer, but only discharges him from liability for the past." *Hazlett v. Estate of Blakely*, 70 Neb. 613; *Brownell v. Adams*, 121 Neb. 304.
4. **Banks and Banking:** LIABILITY OF STOCKHOLDERS: ENFORCEMENT. Sections 4 and 7, art. XII of the Constitution, must be construed together. They are self-operating and self-executing. Before the enforcement of individual liability of

stockholders can be had by the receiver under direction of the receivership court, it must be first judicially ascertained that the assets of the bank have been exhausted, and the amount of deficiency or indebtedness remaining to be enforced against them. Such judicial determination does not fix the liability of such stockholders, but is only a necessary step to be taken by the receivership court before an action can be brought by the receiver to judicially determine the same. *Rogers v. Selleck*, 117 Neb. 569.

5. ———: ———: JURISDICTION. "Jurisdiction of equity to enforce constitutional liability of stockholders of an insolvent banking corporation is based upon the rule obtaining in this state that equity has jurisdiction of an action by a receiver against all the stockholders of a corporation jointly to enforce their contractual or statutory liability." *Brownell v. Adams*, 121 Neb. 304.

6. ———: ———: ———. The appointment of a receiver and judicial determination of deficiency of assets by the receivership court does not vest that court with exclusive jurisdiction to try an equity suit for the purpose of determining the liability of stockholders. After authority is given by the receivership court to enforce the liability of stockholders, if none of the stockholders resides in the county where the receivership court acts, or service cannot legally be had upon one or more of them in that county, such suit may be brought by the receiver against all the stockholders in the district court of any county in this state where lawful service of summons can be had upon one or more of them.

7. **Executors and Administrators**: CONTINGENT CLAIMS: PROCEEDINGS AGAINST HEIRS. An action against heirs to recover real or personal estate which has been received by them as distributees of an estate and which is liable for any debts under provisions of the statute with reference to contingent claims (Comp. St. 1929, ch. 30, art. 7) is not an original action, but a special proceeding for the enforcement and collection of a claim allowed or established in the county court. *Horst v. McCormick Harvester Machine Co.*, 30 Neb. 558.

APPEAL from the district court for Cuming county: DE WITT C. CHASE, JUDGE. *Affirmed in part, and reversed in part.*

A. R. Oleson, for appellants.

F. C. Radke, Barlow Nye and *Fred S. Berry, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

CHAPPELL, District Judge.

This is a suit in equity brought by the receiver of the Farmers State Bank of Altona, Nebraska, in the district court for Cuming county, Nebraska, for the benefit of the unpaid creditors of the bank, to recover from appellants and other stockholders the constitutional liability imposed upon them. The only appellants are Louis W. Luehrmann, administrator of the estate of Herman Luehrmann, deceased, Louis W. Luehrmann, Louise Kohlmoos and Emma Luehrmann, his heirs at law.

There is no dispute in the evidence. The questions are those of law applicable to admitted facts, which are that Herman Luehrmann departed this life intestate February 6, 1928. His estate was duly administered in Cuming county, Nebraska, and final decree entered therein December 5, 1928, assigning the real estate and personal property to the above heirs. The personal property was distributed to them and individual vouchers or releases describing the personal property received by each were given, and the administrator was discharged on December 24, 1928. The value of the property received by the heirs at law from the estate exceeds in value the amount of the stockholders' liability sued for in this action. The appellants, however, refused to accept the ten shares of bank stock which were listed in the inventory of the administrator. Five shares of this stock were issued to deceased as stock dividends but never delivered to him. However, dividends thereon were allowed and received by the deceased during his lifetime, the bank retaining the stock certificates in its possession. This stock was never transferred. All indebtedness of the bank was created and accrued while Herman Luehrmann, deceased, was the owner and holder of such stock.

On January 18, 1929, the bank was closed, and a receiver was appointed by the district court for Wayne

county, Nebraska, wherein the bank was located. On June 15, 1929, after the assets were liquidated and exhausted, a decree of deficiency for more than the capital stock of the bank was entered by the receivership court. This decree provided that all such unpaid indebtedness was created and accrued while Herman Luehrmann, deceased, among others, was the owner and holder of ten shares of the capital stock of the bank of the par value of $100, and that an assessment against the capital stock of the bank and the respective owners and holders thereof was necessary, and that each was respectively liable for an amount equal to the par value of the capital stock of the bank owned by them, and George I. Parker, as receiver of the bank, was thereby authorized and empowered to proceed to collect and to enforce all unpaid stockholders' liability and to bring and maintain such action or actions in court as, in his judgment, were proper and advisable to enforce payment of such liability.

On June 12, 1930, a contingent claim was filed against the estate of Herman Luehrmann, deceased, in the county court of Cuming county, Nebraska, setting forth, in effect, that this action had been filed, but not yet tried or determined, and that the claim against the estate of Herman Luehrmann, deceased, had not yet been determined and was not absolute.

The decree of the district court, in so far as it is of importance here, provides: "Wherefore, it is ordered, considered, adjudged and decreed that the plaintiff have and recover from the estate of Herman Luehrmann, deceased, the sum of $1,000 with interest thereon at 7 per cent. per annum from February 5, 1928, the date of the commencement of this action, and that the same be and hereby is established as a lien upon the personal property of said estate distributed to his said heirs at law and upon the said real estate of which said deceased died seised, so assigned and distributed to them, to wit, the southeast quarter (SE¼) of section five (5), and the southeast quarter (SE¼) of section seven (7), all in

township twenty-four (24), range four (4), east of the 6th p. m., in Cuming county, Nebraska."

Appellants contend that the county court of Cuming county, Nebraska, had exclusive jurisdiction to allow claims against the estate of the deceased stockholder, and that the district court had no jurisdiction to enter a judgment or decree; that the decree of the district court for Wayne county, Nebraska, dated June 15, 1929, ascertained the liabilities against its stockholders, and that the determination of the stockholders' liability therein then became absolute for presentation, hearing and determination in the county court; that the appointment of a receiver by that court and its decree of June 15, 1929, vested jurisdiction in the district court for Wayne county, Nebraska, only, and the receiver could not then maintain an action to enforce liability against stockholders in any other court or county; that the court erred in not rendering a judgment of dismissal in favor of appellants, and that the decree is not supported by the evidence.

It is true that section 16, art. V of the Constitution, provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship; * * * and such other jurisdiction as may be given by general law." Section 27-503, Comp. St. 1929, provides: "The county court shall have exclusive jurisdiction of the probate of wills, the administration of estates of deceased persons." Section 27-504, Comp. St. 1929, provides: "The county court shall have power: First. To hear and determine claims and set-offs in the matter of estates of deceased persons." Section 30-601, Comp. St. 1929, provides: "When letters testamentary or of administration, or of special administration shall be granted by any court of probate, or during any appeal from such order, it shall be the duty of the judge of the court to receive, examine, adjust and allow all lawful claims and demands of all persons against the deceased." Section 30-801, Comp. St.

1929, provides: "No action shall be commenced against the executor or administrator except actions to recover the possession of real or personal property, and actions for relief other than for the recovery of money only."

This is not an action for the recovery of money only, and is not prohibited by section 30-801, Comp. St. 1929. While the law contemplates that all claims shall be allowed by the county court, it also contemplates that certain claims may be presented, in the first instance, in some other court. The receiver had a right, and it was his duty, to proceed in the district court by a suit in equity, such as this, against all the stockholders jointly to determine the liabilty of the estate of the deceased stockholder and other stockholders and establish a trust fund for the benefit of creditors. *Brownell v. Anderson,* 117 Neb. 652; *Brinkworth v. Hazlett,* 64 Neb. 592; *Hazlett v. Estate of Blakely,* 70 Neb. 613; *Brownell v. Adams,* 121 Neb. 304; *In re Estate of Bolton,* 121 Neb. 737; 2 Woerner, American Law of Administration (3d ed.) 1248; 11 R. C. L. 84, sec. 326; 7 R. C. L. 399, sec. 386.

The fact that the estate had been administered, final decree entered, and the property assigned and distributed to the heirs at law, and the administrator discharged, did not bar or defeat this action against the administrator of the estate. The trust of an administrator is an enduring one, and the decree upon final accounting only discharges him from liability for the past. *Brinkworth v. Hazlett, supra; Hazlett v. Estate of Blakely, supra; Brownell v. Adams, supra; In re Estate of Bolton, supra;* 2 Woerner, American Law of Administration (2d ed.) 1373, sec. 571.

The claim for stockholders' liability was contingent. *Stichter v. Cox,* 52 Neb. 532; 2 Woerner, American Law of Administration (3d ed.) 1275, sec. 394; *In re Estate of Bolton, supra;* Dame, Probate and Administration (3d ed.) 425, sec. 415; 24 C. J. 293; *In re Estate of Golden,* 120 Neb. 233; *In re Estate of Ayres,* 123 Neb. 453; 11 R. C. L. 205, sec. 229. The county court, even though

a contingent claim was filed, had no authority to pass upon it until the claim was made absolute against the estate by the decree of the district court. "A contingent claim does not become absolute, within the meaning of the decedent's act, until it becomes a claim proper to be presented to the county court for final adjudication as a claim against the estate." *Hazlett v. Estate of Blakely, supra.* The purpose of this action was, if possible, to place the holder of such claim on terms of approximate equality with holders of absolute claims. It could not become a claim proper to be allowed by the county court until it had passed to judgment in this action. That was the object and purpose of this action, and it could have been accomplished in no other manner. This is not an original proceeding to allow claims against the estate or to order the payment of such claims out of funds in the hands of the administrator. This is a proceeding to make a contingent claim absolute for presentation to the county court for allowance. *Craig v. Anderson,* 3 Neb. (Unof.) 638, relied upon by appellants, is not in point. See Comp. St. 1929, secs. 30-701 to 30-708; *Hazlett v. Estate of Blakely, supra; Brinkworth v. Hazlett, supra; Brownell v. Anderson, supra; Brownell v. Adams, supra; In re Estate of Bolton, supra.*

The decree of deficiency entered in the receivership court on June 15, 1929, judicially determined that the assets of the bank had been exhausted, the amount of the deficit, and the necessity for a stockholders' assessment. It authorized and empowered the receiver to bring the action involved here and enforce and collect the liability. Under the law, this action could not be brought until the deficit was so ascertained and judicially determined. Such decree of deficiency did not judicially determine liability against the deceased stockholder or make absolute any claim against his estate. That could be accomplished only by this action. Sections 4 and 7, art. XII of the Constitution, must be construed together, and, as such, are self-operating and self-executing. All the assets must be first

exhausted and such fact judicially determined before suit can be brought against the stockholders to judicially determine their liability. In other words, a stockholder's liability could not be established by a decree of deficiency, and this claim could become absolute only by a decree entered in this action. *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353; *State v. German Savings Bank*, 50 Neb. 734; *Hastings v. Barnd*, 55 Neb. 93; *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593; *State v. Farmers State Bank*, 113 Neb. 497; *Rogers v. Selleck*, 117 Neb. 569; *State v. Citizens State Bank*, 118 Neb. 337; *Bodie v. Pollock*, 110 Neb. 844; *Dempster v. Williams*, 118 Neb. 776; *State v. Thurston State Bank*, 125 Neb. 120.

The appointment of the receiver and the decree of June 15, 1929, by the district court for Wayne county, Nebraska, did not vest exclusive jurisdiction in that court except in the matter of insolvency and receivership proceedings. Comp. St. 1929, secs. 8-190, 8-191. This is a separate and distinct action in equity, authorized by the receivership court, which could be brought by the receiver against all the stockholders jointly in the district court of any county where one or more of them resides or is present in the county at the time of the commencement of the action and served therein as provided by law. The defendants in this action all lived in Cuming county, Nebraska, where the suit was brought, and there is no dispute that they were all properly served with summons in that county. Comp. St. 1929, sec. 20-409; *Brownell v. Adams, supra.* This liability is contractual in nature, and to hold otherwise would make it practically impossible for the receiver to ever bring suit where all the stockholders lived in a county other than that in which the receivership court was located. We deem it expedient, however, to bring such actions in the district court for the county where the receivership court is located if service of summons can be had upon one or more stockholders in that county.

The suggestion by appellants that the order of deficiency of June 15, 1929, was not binding upon the stock-

holders, we believe was not an issue in the lower court. In any event, the bank was properly in court and the receivership court had full jurisdiction over it and its affairs. The order was binding upon the banking corporation and, therefore, binding upon all its stockholders. *Hawkins v. Glenn,* 131 U. S. 319; *Brownell v. Adams, supra; Commonwealth Mutual Fire Ins. Co. v. Hayden,* 60 Neb. 636; *Bernheimer v. Converse,* 206 U. S. 516; 6 Thompson, Corporations (3d ed.) 878-885, secs. 4981-4986.

The decree of the trial court entered no judgment against the heirs at law; neither did it dismiss them out of the action. It is stipulated in the evidence that all of the indebtedness of the bank was created and accrued while Herman Luehrmann, deceased, was the owner and holder of the stock, and that the heirs at law received the same only through the probate proceedings. While there is eminent authority for the proposition that they may and should be made parties in such a proceeding as this without the necessity of resort to a remedy in the county court, all such cases that we have been able to find have been in jurisdictions where the constitutional and statutory provisions have no similarity to ours or under the equity jurisdiction of the federal courts. Under former decisions of this court, supported by equally as eminent authority, the heirs at law, Louis W. Luehrmann, Emma Luehrmann and Louise Kohlmoos, cannot be held liable in this action. They should have been dismissed at plaintiff's costs. After the claim is made absolute by this action against the administrator, such claim must be filed in the county court within one year and, after allowed and established there, the heirs at law must be pursued in a special proceeding as provided by sections 30-701 to 30-708, Comp. St. 1929.

"The 'claim,' which can furnish the basis for an action to compel a devisee to return a portion of estate assigned to him by proper probate proceedings, must be one allowed in the probate court, or 'established' by proper legal proceedings elsewhere, as a liability of the estate

involved." *Brinkworth v. Hazlett, supra.* "An action against heirs * * * to recover real or personal estate which has been received by them as distributees of any estate which is liable for any debts under the" provisions of the statute with reference to contingent claims "is not an original action, but a special proceeding for the enforcement and collection of a claim allowed or established in the county court." *Horst v. McCormick Harvester Machine Co.*, 30 Neb. 558. See Comp. St. 1929, secs. 30-701 to 30-708; *Brinkworth v. Hazlett, supra; Hazlett v. Estate of Blakely, supra; Brownell v. Anderson, supra; Brownell v. Adams, supra; In re Estate of Bolton, supra;* 3 Woerner, American Law of Administration (3d ed.) 1968, sec. 574, and 1975, sec. 577; 2 Woerner, American Law of Administration (3d ed.) 1267, sec. 392; 1 C. J. 988, 991, 1010; *Stevenson v. Valentine,* 38 Neb. 902; *Craig v. Anderson, supra;* 1 Woerner, American Law of Administration (3d ed.) 534, sec. 156.

The decree of the district court provides that plaintiff, appellee herein, have and recover from the estate of Herman Luehrmann, deceased, the sum of $1,000 with interest at 7 per cent. from February 5, 1928, the date of the commencement of this action. The record discloses that this action was commenced on March 14, 1930. The decree, in form, is against the estate of the deceased instead of against his personal representative, as such. Such decree is irregular, but not erroneous. 24 C. J. 877. The decree of the district court should have been against Louis W. Luehrmann, administrator of the estate of Herman Luehrmann, deceased, for the sum of $1,000 with interest at 7 per cent. from March 14, 1930, the date of the commencement of this action. No complaint is made in brief of counsel that the court granted a lien as provided in the decree, and we will not discuss that matter.

The undisputed evidence establishes that the estate of Herman Luehrmann, deceased, is liable for the stock liability imposed by the Constitution.

The judgment of the district court is affirmed, except that it shall be against Louis W. Luehrmann, administrator of the estate of Herman Luehrmann, deceased, for $1,000 with interest at 7 per cent. from March 14, 1930, the date of the commencement of this action, and that Louis W. Luehrmann, Emma Luehrmann and Louise Kohlmoos, heirs at law, shall be dismissed at plaintiff's costs. The cause is remanded for further proceedings to conform to this opinion.

AFFIRMED IN PART, AND REVERSED IN PART.

STANDARD OIL COMPANY, APPELLANT, V. JAMES O'HARE, APPELLEE.

FILED JANUARY 26, 1934. No. 28651.

1. **Landlord and Tenant:** LEASE: CONSTRUCTION. *Held*, that the purported lease and agency agreement set out in plaintiff's petition, having been made at the same time, with reference to the same subject, and to effectuate the same purpose, will be construed together to the same extent as though made in one instrument.
2. ———: ———: ACCEPTANCE. *Held*, that the signing of said instruments by O'Hare and Byrne, and their transmittal to the plaintiff to be approved or rejected, constituted an offer to contract upon the terms contained therein, and that said offer would not ripen into a contract unless accepted within a reasonable time.
3. **Contracts:** OFFER: ACCEPTANCE. "It is a well-established principle of the law of contracts that an offer does not ripen into a contract unless accepted; that if the offeree within a reasonable time does not accept the offer, it may be treated as if rejected. * * * What constitutes a reasonable time must * * * be a question of fact." *Kukuska v. Home Mutual Hail-Tornado Ins. Co.*, 204 Wis. 166.
4. **Landlord and Tenant:** LEASE: ACCEPTANCE. *Held*, that as the terms of the offer required the plaintiff to promise something, notice to O'Hare and Byrne of the acceptance was essential; that notice of the acceptance of the terms of the lease alone was not notice of the acceptance of the offer, and that notice of the acceptance of the terms of the agency agreement five months after the offer was not within a reasonable time.

5. **Contracts: OFFER: ACCEPTANCE.** "Communication of acceptance is essential, where offer requires promise on part of offeree." *Port Huron Machinery Co. v. Wohlers*, 221 N. W. 843 (207 Ia. 826).
6. **Injunction.** *Held*, that plaintiff never had possession of the service station under the purported lease, and cannot obtain possession thereof by an action for an injunction.
7. ———. "A litigant cannot successfully invoke the extraordinary remedy of injunction, the effect of which would be to obtain possession of real estate, unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate." *Hollinrake v. Neeland*, 94 Neb. 530.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

William H. Herdman and *Cook & Cook*, for appellant.

Joseph E. Daly, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and CLEMENTS, District Judge.

CLEMENTS, District Judge.

The appellant, Standard Oil Company, hereinafter called the plaintiff, claiming to be in possession of certain real estate in North Bend, Nebraska, under and by virtue of a lease executed by James O'Hare and W. H. Byrne, seeks an order in injunction, restraining the appellee, James O'Hare, hereinafter called the defendant, from entering and trespassing on the demised premises, and from interfering with, obstructing, or resisting plaintiff's possession of said premises, and from interfering with, obstructing, or resisting plaintiff in operating its filling station on said premises.

The defendant claims to be the owner of said premises, denies that the plaintiff is now or ever has been in possession thereof, or that plaintiff now has or ever has had the right to the possession thereof, and denies the validity of plaintiff's purported lease.

The cause was tried as an action in equity before Honorable Frederick L. Spear of the sixth judicial district, resulting in a general finding for defendant, and a judgment dismissing the action, canceling the purported lease

and quieting defendant's title as against the plaintiff's claim. The plaintiff brings the action to this court on appeal.

It appears from the evidence that some time prior to March 14, 1930, the defendant James O'Hare and his brother-in-law, W. H. Byrne, contemplated building and operating a gasoline service station on lot 5, block 51, of the city of North Bend, Nebraska. At that time O'Hare owned 5 lots of this block, the remaining lots being owned by a party by the name of Thom. The plan of O'Hare and Byrne contemplated the purchase of the Thom lots by Byrne, and the building of the service station thereon to be owned and operated by the parties as equal partners. The intention of these parties coming to the notice of the plaintiff, Standard Oil Company, it sent a representative to interview them, and to induce them, if possible, to handle and sell Standard Oil Company products exclusively. After an extended conference held on March 14, 1930, between this representative, one John F. O'Connell, and O'Hare and Byrne, at the home of O'Hare, in North Bend, an agreement was reached. This agreement was evidenced by two written instruments, the purported lease and the so-called agency agreement set out in the plaintiff's petition. The lease was, at said time, signed and acknowledged by both O'Hare and Byrne, although Byrne was not yet the owner of any part of the property. However, he afterwards purchased the Thom lots. The agency agreement was signed by Byrne. At the time that this agreement was made, there was located on lot 5 a blacksmith shop, which the evidence shows was of the reasonable rental value of $20 a month and which, at that time, and during all the time of this litigation, was and has been rented for such sum.

Under the terms of the purported lease, the defendants leased to the plaintiff lot 5, including driveways, filling station, and appurtenances, for a period of five years, with an option on the part of plaintiff to extend the term to ten years, at an annual rental of $300, payable $25 each month. In this purported lease, the defendants bind

themselves to build on said lot a gasoline filling station, expending for such purpose not less than the sum of $3,000. No rental to be paid until service station is completed.

It will be seen that the plaintiff, by collecting $20 each month for the blacksmith shop, and applying it on the rental for the use of the service station, would only have to apply $5 of its own money on such rental. The lease provides further that the defendants shall pay all water taxes, and all general and special taxes and assessments that may be levied and assessed against said premises or property owned by them located thereon, and will pay any and all license fees, occupation taxes, and other taxes, impositions and other charges levied against or imposed upon the business conducted on the demised premises and the equipment located thereon, and to furnish, without expense to second party, heat for the demised premises, and pay for all the electricity and water consumed thereon.

At the same time and as a result of the said conversations, the agency agreement was prepared and signed by Byrne. This contract provides in effect that Byrne is to operate the service station, handle the Standard Oil Company products, sell gasoline furnished by the plaintiff at 3 cents a gallon over the wholesale price. This spread between the retail and wholesale prices being called his commission.

It is the plaintiff's theory that these two instruments have no relation to one another. That the purported lease *is* a lease giving it the right of possession of lot 5, the service station to be erected thereon, and all appurtenances thereto, for a period which, at its option, can be extended to ten years; that the agency agreement is simply an agreement to employ Byrne during the pleasure of the plaintiff, and subject to be revoked at any time it so elects. O'Hare and Byrne contend that the sole object and purpose of the parties was, on the part of the plaintiff, to secure a dealer at North Bend, and an outlet for

its products there; on their part, to handle these products on as favorable terms as possible; that both instruments are a part of one agreement; that the so-called lease was never intended to operate as a lease; that it was never intended that the possession of the premises was to pass to the plaintiff, and that the plaintiff never did have possession thereof; that, when it became evident that the plaintiff was claiming some right to the premises by virtue of the lease, they repudiated the entire agreement, refused to receive any payments under the lease, and opened and operated their service station without reference to said agreements.

We think the evidence, the character of the instruments, and the subsequent conduct of the parties amply sustain this contention. O'Hare and Byrne testify in effect that the main object and purpose of the parties was to effectuate an agreement whereby they were to become Standard Oil dealers handling Standard Oil products exclusively; that oil companies generally fix both the wholesale and retail price of their products; that the spread between the wholesale and retail price of Standard Oil products is less than that of most other oil companies; that to induce them to handle its products the plaintiff agreed to allow them a bonus or rebate of $25 a month, and to furnish certain equipment free of charge; that to cover this up and to avoid friction with the federal trade commission, the fiction of the lease and agency agreement was devised.

The representative of the plaintiff, John F. O'Connell, who prepared both instruments, denies this, and testifies that nothing was said about bonus, and that the instruments are, in fact, what they appear to be, in form, a lease and an agreement to employ.

An examination of the terms of these instruments leads to the inevitable conclusion, either that they must be construed together to the same effect as though they are one writing, the purport of which is to permit O'Hare and Byrne to retain possession of their own service station,

while selling Standard Oil products, or that O'Hare and Byrne are incompetents, incapable of doing business, and the transaction is so grossly inequitable and unconscionable as to amount to constructive fraud, and render it unenforceable in a court of equity.

Construing the transaction, in accordance with the theory of the plaintiff, we find that O'Hare and Byrne agreed to build a service station to cost at least $3,000, on a block of their own land, which the plaintiff pleads is a valuable business location because located on the Lincoln Highway, buy the plaintiff a license to do business, pay its occupation tax, heat the building, pay for water and electricity, and pay all property taxes on real estate, service station and equipment, all for $5 a month above the sum the plaintiff would receive for rental of the blacksmith shop.

After the purported lease and agency agreement were executed by O'Hare and Byrne on March 17, they were sent to the Standard Oil Company to be signed by it, if approved. On April 1, 1930, the lease was returned to O'Hare and Byrne, executed by the plaintiff, with a letter informing them that the agency agreement would be held until the station is completed and in operation. O'Hare and Byrne then built the service station at a cost of, not $3,000, the minimum stated in the so-called lease, but at about the sum of $8,000. On August 27, 1930, the station was completed, and they were ready to open it for business. They had heard nothing further from the plaintiff in relation to the agency agreement, and had no notice or knowledge of whether or not it had been approved or signed.

The signing of the lease and agency agreement by O'Hare and Byrne and its transmittal to the plaintiff to be approved or rejected was simply an offer to contract on the terms specified. Before the offer could ripen into a contract, it would have to be accepted, and notice of its acceptance given the offerers within a reasonable time. If, as we have found, the so-called lease and agency con-

tract are to be construed as embodying one agreement, then the acceptance and approval of the lease alone was not an acceptance of the offer. The offer was made on March 17. More than five months thereafter, on August 27, when the station was completed, no notice had been given the offerers that that part of it, relating to the agency agreement, had been or would be accepted, except a vague statement that it was being held. We think the offerers had a right to consider the offer rejected.

"It is a well-established principle of the law of contracts that an offer does not ripen into a contract unless accepted; that if the offeree within a reasonable time does not accept the offer, it may be treated as if rejected. * * * What constitutes a reasonable time must * * * be a question of fact." *Kukuska v. Home Mutual Hail-Tornado Ins. Co.*, 204 Wis. 166.

"Communication of acceptance is essential, where offer requires promise on part of offeree." *Port Huron Machinery Co. v. Wohlers*, 221 N. W. 843 (207 Ia. 826).

"It must be kept in mind that there is a distinction in regard to communication of acceptance between offers which ask that the offeree shall do something, as in the instant case, and offers which ask that the offeree shall promise something. In offers of the latter kind, communication of the acceptance is always essential." *Port Huron Machinery Co. v. Wohlers*, 207 Ia. 826. See, also, *Omaha Loan & Trust Co. v. Goodman*, 62 Neb. 197.

On August 27, the service station being completed, O'Hare and Byrne, no notice of acceptance of that part of the agreement relating to the agency having been received, bought a stock, opened the service station, and commenced its operation. On September 23 a duplicate copy of the agency agreement was transmitted to W. H. Byrne, with a letter in which the plaintiff expressed sorrow that it had not been sent sooner. The premises were then in possession of the defendants; they had been doing business for nearly a month. We think the acceptance of the offer came too late.

It is true that the initial stock was bought of the plaintiff and that O'Hare and Byrne, during nearly or quite all the time they operated the service station before the inception of this litigation, continued to purchase Standard Oil products on practically the same terms set out in the agency agreement, but there is no evidence that these terms were different than the terms usually given independent dealers using such products.

On September 30 the plaintiff sent a check to O'Hare and Byrne for a month's rent, which was refused. Regularly each month thereafter the plaintiff sent a similar check for the same purpose, which was as regularly refused. From this time there seems to have been a constant dispute between the parties, plaintiff claiming that the defendants were in possession of the service station as its agent under the lease, the defendants denying this and repudiating the lease. A mass of evidence was taken at the trial regarding this dispute and regarding communication and meetings between the parties in an attempt to adjust it. We do not think it necessary to review this evidence.

There was also evidence of various statements of counsel for plaintiff, that plaintiff at the inception of the agreement between the parties had no knowledge that the blacksmith shop was on the premises, and that plaintiff claimed no rental therefrom, but no offer to have the lease reformed to exclude the blacksmith shop has been made by it, and at the trial of the case, when evidence was offered that the blacksmith shop was not to be included in the agreement, the offer was met by objections that it was an attempt to change and vary the terms of a written instrument by parol.

We find from the foregoing: That the execution of the purported lease and agency agreement and their transmittal to the plaintiff for approval and rejection was an offer to contract on the terms contained therein; that said instruments should be construed together to the same extent as though they were contained in one writing.

That an acceptance of the terms of the lease alone, and notice to O'Hare and Byrne of such acceptance, was not an acceptance of the offer.

That notice to O'Hare and Byrne five months after the offer was made, and a month after the service station was opened, of the acceptance of the terms of the agency agreement was not within a reasonable time, and O'Hare and Byrne, at the time of the opening of the station, had the right to assume that the offer was rejected.

That the plaintiff never had possession of the service station under the purported lease, and that this action brought to protect a possession which never existed must fail.

"A litigant cannot successfully invoke the extraordinary remedy of injunction, the effect of which would be to obtain possession of real estate, unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate." *Hollinrake v. Neeland,* 94 Neb. 530.

It follows that the finding and judgment of the trial court is correct.

AFFIRMED.

ROSE, J., dissenting.

The premises in controversy were leased in writing for the specific use and single purpose of a filling station where petroleum products of plaintiff were to be kept and sold. It was so understood by the parties to the lease. Plaintiff tendered each month the stipulated monthly rental of $25 and never claimed or received any income from the blacksmith shop. The income therefrom was paid to and accepted by lessors. Without fraud of any kind the parties to the lease contracted for a monthly rental of $25, which was lawful compensation for the use of the leased premises and the improvements the lessors agreed to make. The consideration stated was within the contracting power of the parties. The lease was formally drawn, executed, acknowledged, delivered

and registered. Through the agency of lessors the petroleum products of plaintiff were in fact kept and sold for a time on the leased premises—what was contemplated by the parties. As I view the evidence, all parties to the lease understood and performed it at first with plaintiff constructively in possession of the demised premises. Defendant dispossessed plaintiff, and thus violated his duty as agent under the lease, interfered with his employer's present and future business, and destroyed contractual and property rights of his principal. To prevent the continuance of such wrongs injunction is the proper remedy, as formerly held in this identical case. *Standard Oil Co. v. O'Hare,* 122 Neb. 89. That the former decision is sound and supported by precedent, see *Shell Petroleum Corporation v. Ford,* 255 Mich. 105, 83 A. L. R. 1413, and note. Delay of plaintiff in formally accepting the offer of agency did not destroy the property rights created by the lease. Services of the agent, performed for plaintiff and accepted pursuant to the terms of the contract of employment, waived prompt acceptance of the offer of agency, if delayed. The option of plaintiff to terminate the lease upon 30 days' notice did not invalidate it, since it created an estate for a fixed term of years. *Shell Petroleum Corporation v. Ford,* 255 Mich. 105, 83 A. L. R. 1413, and cases cited in note. Whether considered as a unit or as two instruments, the lease and the contract of agency were duly executed, delivered, valid agreements, as I view them in the light of the evidence and the mutual understanding of the parties in the first instance. Entertaining these views, I dissent from the affirmance.

DAY, J., concurs in dissent.

EARL TREPPISH V. STATE OF NEBRASKA.

FILED JANUARY 26, 1934. No. 28781.

1. **Homicide.** Evidence examined and *held* insufficient to sustain the verdict of murder in the second degree.
2. ———: CORPUS DELICTI. *Corpus delicti* is defined as, "The substantial and fundamental fact or facts necessary to the commission of a crime." Webster's New International Dictionary.
3. ———: ———: PROOF. Homicide *corpus delicti* is not established until it is proved that a human being is dead, and that death occurred as the result of the criminal agency of another person.
4. **Criminal Law:** CIRCUMSTANTIAL EVIDENCE. When, in a criminal case, the evidence is circumstantial, the circumstances established must, to warrant a conviction, be such as to exclude every reasonable hypothesis except that of defendant's guilt.
5. **Homicide.** "The fact that the deceased died suddenly never warrants an inference that he was foully dealt with. It is for the state to prove that his death was the result of a criminal act, and, unless or until this is proved, it is presumed that death resulted from natural causes." Underhill, Criminal Evidence (2d ed.) 541, sec. 312.
6. **Criminal Law:** TRIAL: EXCLUSION OF WITNESSES. An order excluding prospective witnesses from the courtroom during the trial of a cause, except when called to testify, is entirely within the discretion of the trial judge. When such an order has been made, it is the duty of the officers of the court to see that it is obeyed. Where, however, witnesses remain in the courtroom through a misunderstanding of the extent of the court's order, and without the knowledge of the court, they may be permitted to testify where it does not appear that the defendant's rights will be prejudiced thereby.
7. ———: ———. It is the duty of a trial court to expedite the trial of a case as much as is possible without infringing the rights of the parties to a complete and orderly examination of all the facts and circumstances connected with the case, and reasonable effort on his part for such purpose does not constitute error.
8. ———: ———: REVIEW. Complaint in the brief that improper and prejudicial remarks were made by the prosecuting attorney in his argument to the jury will not be considered where the alleged offending remarks do not appear in the bill of exceptions.

ERROR to the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Reversed.*

D. R. Mounts and *Lyle E. Jackson,* for plaintiff in error.

Paul F. Good, Attorney General, and *Paul P. Chaney, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and CLEMENTS, District Judge.

CLEMENTS, District Judge.

The defendant, Earl Treppish, was charged in the information with the crime of murder in the first degree. He was convicted of murder in the second degree, and sentenced to the penitentiary for life, and prosecutes error to this court.

The petition cites 66 allegations of error. Many of these are not urged and need not be noticed.

The third, seventh and eighth assignments of error may be considered together, as each is based upon the proposition that the evidence is insufficient to support the verdict.

The determination of this question has required a careful and patient examination of a bill of exceptions consisting of nearly 700 pages. Such examination discloses that there is little dispute as to the main facts in the case. The dispute arises over the conclusions to be drawn from such facts.

Summarizing the evidence as briefly as possible, it is as follows: In the spring of 1931, the defendant, Earl Treppish, whose home was in the state of Wisconsin, where he has a wife, father, and other relatives, was in Wyoming, where he had gone to procure work. At the ranch of one Ostrom, near Sheridan, he met and became acquainted with Clarence Coy. Coy was a one-armed man, having lost an arm some years before through the accidental discharge of a gun. The kind of work he could perform was somewhat restricted by this misfortune, and he was in Wyoming for the purpose of getting a job

"tramping wool" (packing wool in sacks at shearing time).

Both Treppish and Coy were employed for a time on the Ostrom ranch, and their employment there ceased on the same day. Neither had definite plans for the future, and they decided to seek work in Kansas, where Treppish had acquaintances. They went by rail to Denver, where Coy purchased a used car for the sum of $50. With this car they drove to Kansas, where they were unsuccessful in finding work for both, and concluded to go to the wheat fields of Dakota. En route to Dakota, the car broke down, and they were delayed some three or four days while Treppish, who had had some experience as an automobile mechanic, repaired it. Failing to find work in South Dakota, they returned to the Ostrom ranch in Wyoming. Here they decided to embark on a trapping venture in Holt county, Nebraska. They then drove to Wisconsin, where Treppish said he could procure equipment for trapping. During the trip to Wisconsin, an arrangement was made whereby Treppish, in consideration of $20 loaned by him to Coy, and the work Treppish had done in repairing the car, became half owner of the car, and they were to share fifty-fifty in all equipment used in trapping and all proceeds of the venture. (Treppish's evidence.) The fact of the partnership is, however, established by the evidence of several of the state's witnesses.

Arriving at Mauston, Wisconsin, where Treppish's father and relatives reside, he procured from these relatives, and from friends, traps, guns, bedding, cooking utensils and rubber boots. With this equipment, they returned to Holt county, Nebraska, and, procuring like equipment which Coy had there, proceeded to the head of Beaver creek to commence their trapping venture. Coy had told Treppish that he had a house or shack at the head of Beaver creek, in which they could make their headquarters. On arriving at the place, they discovered that the house had been burned. Coy, when he found this, exclaimed, "The dirty skunk," but explanation of this

remark, or to whom it referred, is not found in the evidence. They camped on Beaver creek for a short time, then removed to an island on the Niobrara river, north from Dustin, Nebraska. Here they built a boat, 18 feet long, with a beam of 54 inches, and procured an engine or motor for it, and here an occurrence took place which, together with the burning of the house, is contended shows enmity of some person or persons toward Coy.

One evening while they were in camp, a noise in the brush was heard and, thinking it was a bobcat which had been stealing their meat, Treppish took a gun and, stepping outside the tent, shot at an object which he thought was the cat, but which proved to be a stump. His shot was immediately followed by a fusillade of shots from across the stream, some of which went through their tent, and one of which went through Treppish's hat. Abusive epithets were also applied to them, and a threat to burn their car shouted to them. This occurrence was investigated by the sheriff of Holt county, but without result. Because of this occurrence, Coy and Treppish moved their camp to a more secure place on the island, and remained there until in November. After this they made various moves, and in January of 1932 established a camp at Spring creek, on land belonging to a Mr. Sweet. Here they were visited a number of times by sons of the owner of the land. One of these visits was on March 31, 1932. At this time both Treppish and Coy were in camp. Some conversation was had with Treppish, in which he made the remark, "It is getting close to moving time." This was the last time, so far as the evidence shows, that Coy was ever seen alive by any person other than Treppish.

On the next day, April 1, Herbert Sweet visited the camp site. He found Treppish there breaking camp. He said they were going back on the island for awhile. Asked where Coy was, Treppish said, "He is down at the river, down the creek, picking up some traps." Thereafter, both Treppish and Coy disappeared.

Some weeks after the disappearance of the parties, the

relatives of Coy became uneasy at his continued absence, and asked the sheriff of Holt county to make an investigation. The sheriff made inquiries which resulted in finding Treppish working at the Bauman ranch, a short distance from Sheridan, Wyoming, but no trace of Coy was found.

Treppish was arrested and held in jail at Sheridan until the officers from Nebraska came and brought him back to Holt county. When Treppish was arrested he had, at the Bauman ranch, the car which the parties had had in Holt county, and at the Ostrom ranch was found the other property which he had brought with him, viz., about half the traps which he and Coy had been using in Nebraska, and a gun and two revolvers, which were identified as having formerly belonged to Coy.

Upon the arrival of the Holt county sheriff in Sheridan, Treppish told him when and where he had last seen Coy; how he came to Wyoming; what places he stopped at on the way out; and detailed all his movements and activities after arriving in Sheridan. A check by the sheriff showed that these statements were substantially accurate. He told the sheriff the story of his leaving Coy, and their agreements and future plans practically as he detailed them in his evidence taken at the trial. He assisted the sheriff in locating the traps, guns, and other property brought by him from Nebraska, and returned with the sheriff to Holt county without objection and without extradition papers.

Now follows the explanation of his presence in Wyoming without his partner Coy, as detailed by him at the trial of the case. He testified that for some time prior to April 1, 1932, he and Coy had been considering a plan whereby he, Treppish, would go to Wyoming and obtain work for the summer, and Coy would remain in Holt county on the island in the Niobrara river, where they had camped and where their boat and engine were located, for the purpose of gardening and raising vegetables for their use in trapping the following winter. No defi-

nite conclusion was reached as to this until the evening of March 31. On the 28th day of March, Treppish and Coy met a man by the name of John Brost, who had been gardening on a small tract of land not far from the island in the Niobrara, with whom they had had some previous conversation about gardening. This matter was again brought up, and a tentative agreement between Coy and Brost was entered into. Brost was to furnish the seed and team work for a garden on the island, and Coy was to plant and tend the garden, and they were to share fifty-fifty on the produce raised. (This is from the evidence of the witness Brost.)

The state, for the purpose of rebutting the evidence of Brost, called several witnesses who testified that the soil on the island was poor and not suitable for gardening.

Treppish testified further that on the evening of March 31 it was definitely decided that Coy should remain and engage in the gardening venture, and Treppish was to take the car and go to Wyoming, obtain work, secure a grub stake, and return in the fall, when trapping would be resumed. They had a few furs on hand which were divided. All their traps on Spring and Otter creeks had been taken up except some that had been set at badger holes. These were not taken up because the badgers had not yet begun to come out of their winter quarters. Treppish was to take some of the larger traps with him to Wyoming for the purpose of catching coyotes and bobcats for the bounty offered by that state. He was to take some small traps which had proved too small for their purpose and try to exchange them for larger ones. He was to take the rifle belonging to Coy for the purpose of night shooting, which means in the parlance of the sheep industry, patroling the range in the night, shooting a gun at frequent intervals to keep marauding animals away from the sleeping sheep. One of the revolvers he had bought from Coy, and the other he took in place of a German Lueger revolver, which he left with Coy, because Coy liked it better than his ".38." All the balance

of the equipment was left for Coy's use. This included traps, which had been taken up, and traps still set at the badger holes, tent, cooking utensils, a sheet steel stove (this stove was afterwards found on Spring creek), guns, bedding, and bedding roll, and Coy's personal belongings (all of these except the gun were afterwards found in the bed of Spring creek).

As Coy was to remove to the island as soon as he had taken up the traps set for badgers, it was agreed that all of this equipment, except the stove, some cooking utensils, and the tent, was to be transported by Treppish the following morning in the car to the bank of the Niobrara river and left there at a point opposite from where their boat was kept. The stove, bedding roll and other things were not to be taken because Coy expected to establish himself in a little shack higher up on Spring creek until the badger trapping season was over.

On the morning of April 1 the parties were up at daybreak. Treppish prepared breakfast while Coy rolled his bedding and gathered the articles he was to keep on Spring creek. After breakfast was over Coy, remarking that he must get out on the trap line because if he had caught a badger during the night it was likely to gnaw itself loose, shouldered his bedding roll, bid Treppish good-bye, and departed, and this was the last time he was seen by Treppish.

After Coy left, Treppish broke camp, loaded in the car the equipment he was to take to the river for Coy, also the articles he was to take to Wyoming, drove to Dustin, where he stopped at the post office and got a letter from his wife, then drove to the river and left the equipment for Coy at the point agreed upon. He then went to Stuart, Nebraska, where he presented to a bank for cashing a fur check. He was told by an officer of the bank that, as he was a stranger, he would have to be identified. He then went to an acquaintance, one Johnny Miller, had the check indorsed by him, and secured the money on the check without further trouble.

From there he went to Bassett, Nebraska, and then to Norden, where he was delayed two or three days waiting for a casing that had to be ordered. From Norden he drove by easy stages to Sheridan, Wyoming, and from there went out to the Ostrom ranch, where he and Coy had worked the summer before. He afterwards secured work at the Bauman ranch, where he was arrested.

Such is the story as told by Treppish upon the witness-stand. It was given in a frank, straightforward manner, and with a wealth of detail impossible to include in this summary. A long and grilling cross-examination failed to shake it. It was not rebutted except in two particulars.

The postmistress at Dustin and several others who were in the post office during the 1st of April testified that Treppish was not there on that day. However, the letter from his wife was directed to him at Dustin, and was postmarked Milwaukee, Wisconsin, March 25. It must have been delivered to him from that post office, Dustin, either on the 1st of April, or within a few days prior thereto, but the postmistress does not attempt to state when it was so delivered, nor could she or the other witnesses remember any person who received mail from the post office on any other date.

Several rebuttal witnesses were introduced who testified that they were at the river on or about the 1st of April, at or near the post where Treppish testified he left the equipment for Coy, and that nothing of the kind was there.

We will now proceed to further developments in the case as disclosed by the evidence. To understand these developments, it is necessary to know something of the topography of the country where the camp on Spring creek was located. Spring creek is a little brook, normally about a foot wide and two or three inches deep. It runs through a canyon or gulch with very steep sides; this gulch falls sharply toward Otter creek into which Spring creek empties. The camp was located on a shelf on the side of this canyon, about 60 or 70 rods from

where the two creeks join. At some distance above the camp, near the head of Spring creek, is the little shack where, according to Treppish, Coy was to make his headquarters for a time after Treppish left. The country around the camp is very rough and heavily wooded. Otter creek is a much larger creek than Spring creek and runs in a northerly course to the Niobrara river. Both creeks are subject to floods during and after heavy rains.

After the sheriff had returned Treppish to Nebraska he, the sheriff, on July 17, 1932, made a search of Spring creek and Otter creek, and the vicinity of the camp.

Near the camp site, the sheet steel stove and some stove pipe were found. About 100 yards below the camp site, in the bed of the creek, there were found a bedding roll, bedding and clothing, all identified as having belonged to Coy. A short distance from where the bedding roll was found, a small piece of bone identified as a piece of a human skull was picked up from the bank of the creek, 60 or 70 rods below the junction of Spring and Otter creeks; in Otter creek were found some bones of a human skeleton. These bones were identified as being from the skeleton of Clarence Coy. The skull was missing and was never found.

At the close of the evidence, defendant moved for a directed verdict in his favor on the ground that the evidence was insufficient to show that a crime had been committed, or that Clarence Coy came to his death through the unlawful agency of Treppish. This motion was overruled, the case was submitted to the jury, and a verdict of murder in the second degree returned.

The theory urged by the prosecution to the jury, and now urged to the court on the appeal, is that, on the night of March 31, or the morning of April 1, 1932, Earl Treppish killed Clarence Coy, breaking his skull with some weapon, the nature of which is not disclosed. That to conceal the crime, Treppish buried the body and Coy's bedding roll and belongings in the bottom of Spring creek, about 30 feet above the camp, and that a flood in the

creek some time in the summer washed the body, bedding and clothing down the creek to where they were found in July. Of course this may be the correct solution of Coy's death, but it is based entirely upon surmise.

There is no evidence that Coy's body, or his belongings, were buried in Spring creek. Some parties testified that about 30 feet above the camp some stakes were driven in the creek; that on these stakes had collected some brush and débris; and that in this débris were found a bottle, some tin foil from a cigarette package, and two sodden cigarettes. This is all the evidence that in any way relates to this part of the theory of the prosecution. It seems the height of absurdity to imagine that, to conceal a crime, a murderer would bury the body and then mark the grave by driving stakes around it.

There is no evidence that Treppish killed Coy by blows that broke his skull. Coy's skull was not found and, so far as the evidence discloses, his skull may be buried in the mud of Otter creek entirely intact. The piece of skull found was not and could not be identified as part of the skull of Coy. It was not found in the same place or near the other bones. The expert witness, called by the prosecution, could not and would not identify it as a part of Coy's skull. He, Dr. Wilson, testified: "Q. Now, handing you state's exhibit 13 (the piece of skull), is there any identity between that and the rest of the bones here (the skeleton of Coy)? A. No. Q. It is not possible to identify that as belonging to this body? A. No."

Not only was the piece of skull not identified as being part of the skull of Coy, but the condition in which it was found raises a strong presumption that it could not have been from his skull. It will be remembered that Coy was seen alive on the 31st day of March. This piece of skull was found on July 17, and yet it was in such a condition that it broke in two when picked up. It can hardly be credited that in 108 days after the death of Coy a piece of his skull would be in such a state of

disintegration that it would fall to pieces when picked up. It seems more reasonable to suppose that this piece of skull had laid for years in the vicinity of Spring creek, and had been washed into the creek by some of the many rains that occurred there in years past. This supposition is made more tenable by the fact that other unidentified skeletons had previously been found in the locality covered by the testimony in this case, viz., near the Grand Rapid bridge across the Niobrara river. (See evidence of George Robertson, page 211 of the bill of exceptions.)

If the theory of the prosecution is not supported by the evidence, and we must find that it is not, then the manner in which Coy met his death is purely conjectural. He may have died from natural causes. Heart disease or cerebral hemorrhage may have taken him suddenly while on the precipitous banks of Spring creek, and his body rolled or washed into the creek.

"The fact that the deceased died suddenly never warrants an inference that he was foully dealt with. It is for the state to prove that his death was the result of a criminal act, and, unless or until this is proved, it is presumed that death resulted from natural causes." Underhill, Criminal Evidence (2d ed.) 541, sec. 312.

He may have been shot by some person unknown. He may have met his death from a fall. He may have been drowned while Spring creek was in flood. Treppish may have killed him in some manner not disclosed.

We cannot determine from the evidence when he died, the cause of his death, or whether any person was criminally connected with it. The *corpus delicti* has not been proved.

If the fundamental fact of Coy's death, through the criminal agency of some person, was established, then the fact that Treppish last saw him alive, the finding of Treppish in Wyoming with the car, and all the facts and circumstances of the association of the parties are competent to be considered to connect Treppish with the crime. It may be doubted that the evidence is sufficient for that purpose.

No motive for the crime, on the part of Treppish, is shown. The relation of the parties was friendly. The car taken by him was of no greater value than the boat left behind. His actions after the alleged crime were not such as would be expected of a person guilty of murder. His story is not impossible of belief and is strongly supported by some of the circumstances that are undisputed.

Treppish told just what articles he left with Coy on Spring creek. All of these, with the exceptions of the gun and traps, were afterward found on Spring creek. Among the articles left were a bed roll and bedding. The evidence shows this was the only bed roll had by the parties. Treppish, when he reached Sheridan, was obliged to buy a bed roll on credit and pledge a revolver as security for it. If, when Treppish left Spring creek, Coy was dead and Treppish was appropriating his belongings, why would he have left the bed roll and bedding? Treppish told just what articles he took to the river and left for Coy. None of these articles have ever been found, nor is there any evidence that Treppish thereafter had or disposed of them.

It is contended that his evidence as to leaving these articles at the river is rebutted by evidence of parties who did not see them there. However, the boat owned by the parties was on the island just opposite where Treppish said these articles were left. Treppish could not have taken the boat with him, but it disappeared and has never been found. If the boat was stolen, it is at least possible that the articles which Treppish claims to have left on the bank of the river were taken at the same time.

There is much about this case that is mysterious, and suspicion inevitably pointed to Treppish, but suspicion is not sufficient to establish that a crime has been committed.

Having reached the conclusion that the case should not have been submitted to the jury because of the failure of the state to prove the *corpus delicti*, it will not be neces-

sary to devote very much time to an examination of other allegations of error.

The alleged error most earnestly urged is that, after an order had been made by the trial judge, excluding all witnesses from the courtroom except when called to testify, certain of the state's witnesses remained in the courtroom, heard the testimony of all or many of the other witnesses and were then permitted to testify in the case over the objections of the defendant.

It seems that, through a misunderstanding of the extent of the court's order, the witnesses in chief for the state, after testifying, remained in the courtroom during the remainder of the trial. Some of these were called as rebuttal witnesses. Other witnesses called on rebuttal alone had also been in the courtroom and heard all the evidence in the case. The defendant objected to any of these witnesses being permitted to testify after they had remained in the courtroom and heard the evidence of other witnesses, all in violation of the court's orders. This objection was overruled and the witnesses permitted to testify.

It does not appear that the trial court had any knowledge of the violation of this order until it was called to his attention by the objections of defendant. We have carefully examined the evidence given by these witnesses and do not find that it was of a nature to have been influenced by what they heard from other witnesses. Therefore no prejudice to the defendant resulted from the unintentional disregard of the court's order.

It is urged that the trial court interfered in the examination of defendant's witnesses, continually urging the defendant's attorneys in their examination of witnesses to hurry, and continually interrupting the defendant's attorneys in their examination of witnesses, thereby prejudicing the jury against the defendant. It is the duty of a trial court to expedite the trial as much as is possible without infringing the rights of the parties to a complete and orderly examination of all the facts and

circumstances connected with the case. In his endeavor to expedite the trial in this case, the trial judge used some expressions that perhaps would have been better omitted. However, we are satisfied reversible error cannot be predicated thereon.

Complaint is made that there was misconduct on the part of the prosecuting attorney in his argument to the jury, in that he called Treppish a liar, called attention to the crowd in the courtroom as being Coy's friends and said, "There have been men killed in this county for less money than that, and one of them not very long ago." If such remarks were made, they were clearly improper and prejudicial. However, no record of such remarks appears in the bill of exceptions nor are the statements in plaintiff's brief substantiated by affidavit or in any other manner. They cannot therefore be considered.

Many other alleged errors are cited, which we think need not be commented upon.

We find no reversible error in the case save and except the overruling of the defendant's motion for a directed verdict because of failure of proof that the death of Clarence Coy resulted from the unlawful act of the defendant Earl Treppish.

For this error, the cause must be reversed.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. AMERICAN STATE BANK OF SPRINGFIELD, APPELLANT: REVA GRELL, INTERVENER, APPELLEE.

FILED JANUARY 26, 1934. No. 28718.

1. **Banks and Banking**: SPECIAL DEPOSIT. A deposit of money in a bank under a contract or understanding that the same shall be held intact and returned in specie to the depositor is a special deposit.
2. ———: ———. A deposit of money in a bank under a con-

tract or understanding that it shall be held and used for a special purpose is a specific deposit.

3. ———: TRUST FUNDS. Where a trustee was appointed by the court over a fund to be paid over in instalments to a third person, and by the same order the fund was directed to be deposited in a certain bank of which the trustee was cashier and general manager, until further order of the court, a relation of trustee and *cestui que trust* was created between the bank and such third person.

4. ———: ———. In such case the sum became a specific deposit made for a special purpose, and was a trust fund payable out of funds in the hands of the receiver of such bank upon its insolvency, and payable in preference to the claims of other creditors.

APPEAL from the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

F. C. Radke, Barlow Nye and *Dwyer & Dwyer,* for appellant.

E. S. Nickerson, contra.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CARTER and REDICK, District Judges.

REDICK, District Judge.

The American State Bank of Springfield, Nebraska, is in the hands of receiver for liquidation and Reva Grell, by Exilda Grell, her next friend, filed a petition of intervention in the proceedings seeking to have the sum of $489.64 declared a trust fund payable in preference to the claims of general creditors. The receiver classified the claim as a preferred claim but declined to allow it as a trust fund payable in full. Upon appeal to the district court the classification of the receiver was set aside and the claim established as a trust fund payable in full before the claims of other creditors, and the receiver appeals.

The facts necessary to an understanding of the question presented are not in dispute and are substantially as follows: On April 2, 1926, in a divorce action then pending

in the district court for Sarpy county, Nebraska, wherein Exilda Grell was plaintiff and Fred Grell, Jr., was defendant, the defendant was directed by the court to pay to E. N. Christianson, who was by the court appointed trustee thereof, the sum of $1,700 for the support of Reva Grell, minor child of the parties. A copy of the order is given in full:

"It is therefore further ordered, adjudged and decreed, that the defendant, Fred Grell, Jr., pay to E. N. Christianson, who is by this court named trustee, who is required to give bond in the sum of $2,000 with surety to be approved by clerk of this court and make report to court once each year, the sum of $1,700 in cash, which is computed as the present worth of the allowance provided in the former decree, which is herein vacated, which said payment to said trustee by the defendant is in lieu of the provisions of said decree as to allowance, herein revised and vacated. That said money in the hands of the trustee shall be a trust fund for the support of Reva Grell, minor child of the parties, and the trustee shall pay out of said fund, with accumulated interest, the sum of $120 on April 1st and October 1st of each year, beginning with the month of April, 1926, to Exilda Grell, mother of said minor, for the support of said minor child.

"That said fund shall be kept on deposit in the American State Bank of Springfield, Nebraska, at the current rate of interest protected by the state guaranty fund, until further order of this court, and be evidenced by time certificates of deposit renewal April and October."

E. N. Christianson, appointed trustee by the court, was also the cashier of the bank, and therefore occupied a dual capacity with reference to the fund in question. In receiving the fund from Fred Grell, Jr., he acted as trustee under the order of the court, and in receiving the fund for deposit in the bank of which he was cashier he acted as agent of the bank. In this situation the bank must be held cognizant of all the facts within the knowledge of the trustee, with reference to the transaction in ques-

tion. *State v. American State Bank,* 108 Neb. 98. After payment of the first instalment of $120 to Exilda Grell, the trustee deposited in the bank the sum of $1,580, taking a time certificate of deposit therefor maturing at the due date of the next instalment in October. The fund was not kept separate by the bank but was mingled with its general assets, and a sum in excess of the amount claimed by intervener, $489.64, came into the hands of the receiver, and there remained. As each instalment became due new certificates were issued maturing at the date of the next following instalment, which was paid by check of the trustee until the closing of the bank, leaving the amount claimed still unpaid.

It is the claim of the intervener that the fund in question was deposited in the bank for a specific purpose, to wit, to be paid out in semiannual instalments to the intervener; not that it was a special deposit but a specific deposit, the distinction being that in the former case the fund is to be held intact and returned in specie, while in the latter the fund may be intermingled with the general assets of the bank, but is to be applied only for a certain purpose. In either case the fund may constitute a trust entitled to preferential payment over general creditors.

Whether or not a deposit is general or specific depends upon the terms of the contract at the time. *In re Warren's Bank,* 209 Wis. 121.

Counsel for receiver cites the case of *Reichert v. American State Savings Bank,* 264 Mich. 366, to the effect that money deposited in bank to be used for a specific purpose did not make it a trust fund, "but it would become trust fund only if deposited with understanding that it should be set apart for particular purpose, and not mingled with other money of bank." (249 N. W. 876.) In that case the contract was that all funds deposited in excess of $3,250 were to be transmitted to the bank's correspondent in Chicago in the ordinary course of business. While the holding in that case was undoubtedly

correct upon its special facts, we think the statement of the principle is too broad, as it leaves out of view entirely the distinction between a special and a specific deposit. To apply the law as there announced would exclude from protection a deposit made in a bank for the purpose of completing a transaction in real estate upon the delivery of deed, abstract, etc., in the ordinary terms of such transactions, unless the money was placed in a special fund and kept intact. Unless a special contract to that effect was made with the bank it could not be said that it was within the contemplation of the parties that the particular currency should be turned over to the grantor, but rather that the fund should be covered into the general assets of the bank upon the understanding that the bank would pay an equal amount upon presentation of the deed. To so hold would be contrary to practically all the decisions relating to deposits for a specific purpose. Counsel also cites *Ottawa Banking & Trust Co. v. Crookston State Bank,* 185 Minn. 22, that "guardian's deposit of ward's money in the guardian's name as such, in absence of special circumstances, constitutes 'general deposit' as respects preference." (239 N. W. 666.) The qualification, "in absence of special circumstances," renders this case inapplicable. Also to the point that a deposit represented by a time certificate of deposit is a general deposit, and not a trust, *State v. South Fork State Bank,* 112 Neb. 623; *Farrens v. Farmers State Bank,* 101 Neb. 285; *State v. Farmers State Bank,* 111 Neb. 117. An examination of these cases, however, will disclose that in none of them were there any special circumstances having a tendency to establish the existence of a trust.

Counsel for receiver cites a number of cases to the proposition that money deposited in the bank as a general deposit by a guardian or trustee, known to be such by the bank, cannot be considered and paid as a preferential claim over other depositors; the mere knowledge of the bank of the character of the fund will not raise a trust. This proposition may be conceded, but it begs the

question whether or not in the particular case the fund was a general deposit. He also cites a number of cases to the point that a deposit represented by a time certificate of deposit is a general deposit and not a trust, but in none of those cases was the question of trust involved. He also says that, "In the absence of a special agreement by which the bank becomes a trustee or circumstances sufficient to create a trust, a deposit will be deemed a general deposit"—citing *Pethybridge v. First State Bank,* 75 Mont. 173; *Gray v. Elliott,* 36 Wyo. 361; *Lamro State Bank v. Farmers State Bank,* 34 S. Dak. 417; *State v. First State Bank,* 123 Neb. 643. But the question here is whether or not the circumstances surrounding the deposit were of such a character as to create a trust. In none of the cases cited were any special circumstances shown having that effect. He also cites *Commercial Nat. Bank v. Smith,* 244 N. W. (S. Dak.) 521, in which it was held that a general deposit "possesses no trust quality and is mingled with the other funds of the bank, and if insolvency ensues, depositor shares *pro rata* with other creditors." It was, however, also held in that case: "As respects priority, when special deposit is made for specific purpose for third person's benefit, trust in favor of third person is created; title remaining in depositor." And in the opinion it was said, quoting from *City of Sturgis v. Meade County Bank,* 38 S. Dak. 317: "As a rule, when money is deposited in a bank, title to such money passes to the bank. The bank becomes the debtor of the depositor to the extent of the deposit, and, to that extent, the depositor becomes the creditor of the bank. * * * Such deposit then constitutes a part of the assets of the bank, and, in case of insolvency, belongs to the creditors of the bank in proportion to the amount of their respective claims. Exceptions to this rule are: First, where money or other thing is deposited with the understanding that that particular money or thing is to be returned to the depositor; second, where the money or thing deposited is to be used for a specifically designated purpose; and,

third, where the deposit itself was wrongful or unlawful." In that case a general deposit was made in bank by railroad contractor for the purpose of meeting checks drawn by him for the payment of labor and materials in carrying out his contract, and the court held that no trust was created in favor of the holders of claims for labor and materials furnished. It seems to us that case presented merely the ordinary situation of the deposit of funds in the conduct of general business and presents no feature indicating the establishment of a trust.

In the case at bar we have the following special circumstances bearing upon the nature of the deposit: (1) The fund was established for the benefit of Exilda Grell for the support of the minor; (2) the court appointed Christianson as trustee of the fund; (3) the court ordered the fund deposited in the bank to be paid out in accordance with the order of the court; (4) the fund was accepted by the bank with full knowledge as to the specific purpose to which it was to be devoted. We think under these circumstances the deposit cannot be said to be a general one, but for a specific purpose, for the benefit of a third person, and that by the acceptance of the deposit the bank became the trustee of that third person, and that the claim should have preference over the general creditors of the bank.

It was held in *Officer v. Officer*, 120 Ia. 389: "A specific deposit exists when money or other property is given to a bank for some specific and particular purpose, as a note for collection, money to pay a particular note, or property for some specific purpose." In order to create a specific deposit, it is not necessary that the fund be kept intact as in the case of a special deposit, but it is sufficient if the deposit is made with the agreement or understanding with the bank that a sum equal to the deposit shall be forthcoming for the special purpose intended.

The case of *State v. Farmers & Merchants State Bank*, 125 Neb. 437, was in many respects like the case at bar.

There, one Cheney was appointed referee in partition for the sale of real estate, and received deposits of purchasers on their bids. He was required to give bond as referee and arranged with the cashier of the bank to sign the bond upon the agreement that Cheney would deposit the money accruing from the sale in the bank. The money was so deposited in the name of "L. H. Cheney, Referee Harsch Estate." Later on the sales were set aside and the referee ordered to return to the bidders the deposits made on their bids. In the meantime the bank had closed its doors and the referee was unable to comply with the order of court. This court held that the deposit in question constituted a trust fund entitled to preference over the claims of general creditors. But the court treated the fund as a special deposit, saying: "When there is an agreement with bank officers that certain money is placed in a bank for the specific purpose of being held intact until the completion of a contemplated land sale by a referee in partition, and then to be turned over to the parties entitled thereto, the money so placed in the bank may be reclaimed as a trust fund, where the bank becomes insolvent while holding such money." The case does not control the present one, as it is not contended that the fund in question here was a special fund to be held intact, the intention being that it was a specific fund agreed to be used for a specific purpose, which puts the case in another class. It was, however, held in that case that it was not necessary for the claimant to trace the identical funds into the receiver's hand, and the fact that the original fund may not have been kept intact did not prevent it being affected with a trust. It is true that in that case the general doctrine was announced that, where "certain money is placed in a bank for the specific purpose of being held intact until the completion of a contemplated land sale by a referee in partition, and then to be turned over to the parties entitled thereto, the money so placed in the bank may be reclaimed as a trust fund, where the bank becomes insolvent while holding

such money" (citing cases); but the statement of the contract in that case did not include a provision that the money should be held intact as a special deposit, and therefore the statement above quoted of the general rule as to special deposits does not detract from the previous holding of the court in that case that "Trust funds placed in a bank for a particular purpose are sufficiently traced into the hands of the bank's receiver to entitle their owner to claim them if the fund delivered to the receiver exceeded the amount of the trust, although the money deposited may not have been kept intact"—citing *Hudspeth v. Union Trust & Savings Bank*, 196 Ia. 706. Furthermore, Paine, J., in the opinion of this court, approved the following general statement of the rule, quoting from 31 A. L. R. 466, note: "Where a deposit is made in a bank with the distinct understanding that it is to be held by the bank for the purpose of furthering a transaction between the depositor and a third person, or where it is made under such circumstances as to give rise to a necessary implication that it is made for such a purpose, the deposit becomes impressed with a trust which entitles the depositor to a preference over the general creditors of the bank where it becomes insolvent while holding the deposit." See *Corporation Commission v. Trust Co.*, 194 N. Car. 125; *Blythe v. Kujawa*, 175 Minn. 88.

It would seem that there is greater reason for holding the deposit in the present case to be a special deposit than in the case cited, in view of the fact that it was to remain until further order of the court; however, we prefer to treat it as a deposit for a specific purpose.

The conclusion we have reached finds support in the following cases cited by appellee: *State v. Farmers & Merchants Bank of Kennard*, 118 Neb. 495; *Morton v. Woolery*, 48 N. Dak. 1132; *Village of Monticello v. Citizens State Bank*, 180 Minn. 418; *Reichert v. Midland County Savings Bank*, 254 Mich. 551; *In re Warren's Bank*, 209 Wis. 121, in which case it was said: "It seems to be well settled that a deposit made in a bank for a

specific purpose, and for that alone, partakes of the nature of a special deposit, and does not establish the relation of debtor and creditor between the depositor and the bank, but establishes a fiduciary relation which is sometimes declared to be that of principal and agent, while some courts hold that a trust relation is created (citing cases). Such a deposit is called a specific as distinguished from a special deposit."

The receiver objects that in the cases just cited the bank was to distribute the fund. If this objection has any force it is answered by the requirement of the court order that certificates of deposit be issued by the bank payable April 1 and October 1 of each year; that the bank was so directed, rather than to pay direct to Exilda Grell, creates no valid ground for distinguishing those cases.

We think the present case falls clearly within the principle announced by this court since the argument: "Where bank accepted check with knowledge that it was deposited for specific purpose of using proceeds to pay for cattle, deposit held trust fund to which payee of check given for purchase price of cattle was entitled to preference on bank's insolvency." *State v. Bank of Otoe*, 125 Neb. 530 (quoting from 251 N. W. 111).

Other matters referred to in the briefs do not seem to require discussion in view of our holding on the main point.

We find no error in the record and the decree of the district court is

AFFIRMED.

CARTER, District Judge, dissenting.

The facts in this case are correctly set forth in the majority opinion and I will refer to them only in so far as it is necessary so to do in explaining the reasons for my dissent.

It appears that one E. N. Christianson was appointed trustee of the fund involved herein by the district court

for Sarpy county. In the order appointing the trustee, the trustee, and not the bank, was required to make quarterly payments for the benefit of the *cestui que trust;* the fund was to bear interest, be protected by the depositors' guaranty fund, and be carried in the form of certificates of deposit which were to be made payable on the same dates that the trustee was to make his payments under the terms of the trusteeship. It seems to me that the above conditions contained in the order creating the trust are conclusive of the fact that the fund was to be placed in the bank as a general deposit; otherwise, there could have been no reason for their being in the court's order. It is undisputed that a trustee can lawfully make a general deposit of trust funds in this state. I do not concur with the view of the court as expressed in the majority opinion to the effect that, the fund having been accepted by the bank with full knowledge as to the specific purpose to which it was to be devoted, it is therefore a trust fund.

If the bank had full knowledge because of the fact that Christianson was also cashier of the bank, it certainly knew when it accepted the fund that it was doing so under the directions of the court as contained in the order set out in the majority opinion, and which provides conditions that clearly make it a general deposit. Mere knowledge of the nature and purpose of the trust fund is not sufficient to make the bank a trustee. *Diehl v. Johnson,* 123 Neb. 699. In the case of *Commercial Nat. Bank v. Smith,* 244 N. W. (S. Dak.) 521, it was held that a trust fund did not exist, for the reason that there was no allegation or proof of an agreement by the bank that the deposit was to be held other than as a general deposit. In the case of *In re Warren's Bank,* 209 Wis. 121, cited in the majority opinion, it was held: "A deposit in a bank is general or special, depending upon the contract of the parties at the time the deposit is made. It is presumed to be general in the absence of an agreement to the contrary." In *Reichert v. American State Savings Bank,* 264 Mich. 366, it is held: "That money deposited

in bank was to be used for specific purpose did not make it trust fund, but it would become trust fund only if deposited with understanding that it should be set apart for particular purpose, and not mingled with other money of bank." (249 N. W. 876.)

To hold that knowledge of all the circumstances in this particular case makes the bank a trustee of the fund when that knowledge of itself discloses that the order of the court creating the fund provides for a general deposit of the funds appears illogical as I view it.

The fact that the order creating the trust provided that the certificates of deposit were to fall due on certain dates does not indicate that the fund was to be distributed by the bank. This provision was for the convenience of the trustee, Christianson, whose duty it was to distribute the fund on the same dates the certificates of deposit became due. The court order expressly says that the trustee shall make the payments from the fund.

The creation of a trust fund is contractual in its nature, and for a court to hold that a trust fund could be created without an agreement or understanding, express or implied, gives the trust fund rule an interpretation, in my judgment, that is not supported by reason or by the authorities. Knowledge that a fund is deposited for a specific purpose should be accompanied by an agreement or understanding with the bank that it is accepted as such.

The rule seems to be almost universal that a special deposit is always the result of a special agreement, express or implied, between the bank and the depositor, whereby the bank becomes the disbursing agent to carry out the special purpose of the depositor. In the case at bar, if the depositor, Christianson, carried out his instructions given him by the court, and I believe he did to the letter, the deposit could be nothing other than a general deposit. In the face of these facts, mere knowledge by the cashier of the bank could not change the debtor and creditor relationship thus established.

In the case at bar, there is no evidence of any agreement or understanding with the bank. The deposit simply was a deposit of trust funds by the trustee thereof. It was not made in violation of the terms of the trust, but complied strictly therewith. The terms of the trust having expressly provided for a general deposit and the bank not having entered into any different arrangement or agreement, it is my opinion that the fund is a general deposit, and not a trust fund.

While I respect the opinions of the other members of the court sitting on this case and know that they have given it their serious and earnest consideration, yet I feel that the trust fund theory is being extended by the majority opinion to such an extent that it is unfair to the general depositors of failed banks. In my judgment the rule announced is not supported by the authorities and should not be adopted as the law of this state. For the reasons herein set out, I am obliged to dissent.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. SOUTH OMAHA STATE BANK, APPELLANT: FRANK DEMOFF ET AL., INTERVENERS, APPELLEES.

FILED FEBRUARY 8, 1934. No. 28802.

1. **Banks and Banking**: PURCHASER OF CASHIER'S CHECK. "By purchasing a cashier's check, bank draft or certified check, the purchaser usually becomes a creditor of the bank and the holder of exchange, and not the beneficiary of a trust, in absence of special circumstances creating the relation of trustee and beneficiary." *State v. Farmers & Merchants Bank*, 123 Neb. 358.
2. ———: TRUST FUNDS: BURDEN OF PROOF. The burden of proving that money in a bank is a trust fund rests on the person asserting it and must be proved by clear and satisfactory evidence, having in view all the surrounding facts and circumstances. 26 R. C. L. 1203, sec. 44.
3. ———: ———: ———. *Held*, that the evidence here failed to establish a trust fund in favor of claimants.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Reversed, with directions.*

O'Sullivan & Southard, F. C. Radke and *Barlow Nye*, for appellant.

J. J. Krajicek, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

GOSS, C. J.

The receiver appeals from the allowance of the claim of Frank Demoff and Barbara Demoff as a trust fund with priority over claims of general depositors.

The claim was based upon a cashier's check for $1,500, issued August 3, 1931, payable to the Demoffs and still held and owned by them when the bank was closed and a receiver appointed a few weeks later. They duly filed their claim asking for its allowance as a trust fund. On December 18, 1931, the receiver classified it as a valid claim, ranking it with depositors and holders of exchange, but denied it priority of payment over other creditors. Claimants were given leave to file a petition of intervention and did so, claiming a trust fund for the amount named. Issues were joined and a trial had. In the meantime the Demoffs had been paid dividends of $600. The court decreed that the whole $1,500 was impressed on the assets as a trust fund, charged them the amount paid as dividends, and, on January 3, 1933, ordered the receiver to pay them $900, prior to the payment of other claims of general depositors.

It is now settled that the mere purchase of the cashier's check from the bank, by the Demoffs, did not create a trust fund in the hands of the bank. "A check on a bank does not operate as an assignment of funds therein to the amount of the check, a former rule to the contrary having been changed by statute. Comp. St. 1929, sec. 62-1606; *State v. State Bank of Belvidere*, 122 Neb. 797. By purchasing a cashier's check, bank draft or certified

check, the purchaser usually becomes a creditor of the bank and the holder of exchange, and not the beneficiary of a trust, in absence of special circumstances creating the relation of trustee and beneficiary." *State v. Farmers & Merchants Bank*, 123 Neb. 358, citing, as precedents for the rules, *State v. State Bank of Belvidere*, 122 Neb. 797; *State v. First State Bank of Alliance*, 123 Neb. 23.

This leaves to be determined whether there were special circumstances present and proved which changed the usual relation of debtor and creditor, between the bank and the Demoffs, to that of trustee and beneficiaries.

In their brief appellees concede that the presumption, when money is deposited in a bank, favors the relationship of debtor and creditor. But they contend that the facts and circumstances "overcome the presumption, and show that this money was deposited as a bailment, or special deposit."

The testimony of the Demoffs was that they contracted to buy some vacant real estate adjoining their home. Their money was in a building and loan association, where advance notice to withdraw had to be given. They gave notice and after a month drew out $1,500 in money. The abstract did not show marketable title and there was delay. They were afraid to keep the money and so took it to the bank. Their testimony was given through an interpreter as they speak but very little English. They are said to be Bohemians.

Frank Demoff testified that he put the money in the bank, though there is other testimony from him clearly indicating that it was not money but in the form of a check. He says he dealt with Frank L. Vlach, who was vice-president and cashier of the bank and who issued the cashier's check. This check for $1,500, dated August 3, 1931, payable to the order of Frank and Barbara Demoff, is in evidence. When he gave Vlach "the check" and got the cashier's check, he says he told Vlach he intended to use the money to buy some property and wanted to leave it ten days. Vlach cautioned him not to lose the

cashier's check. When asked if, when Vlach gave him the check, he said he would keep the money for him for eight or ten days, he answered: "Surely, I knew he would keep it for me eight or ten days."

Barbara Demoff says she was with her husband when the money was put in the bank and met Vlach that day but left it to her husband to do the talking. Her husband told Vlach he "wanted to put the money in the bank for about seven days—eight or ten days," and "He said to keep it for us * * * and he said for us to watch that check and not lose the money, because if we lose it, if we lose the check, then we lose the money." On August 3 she had gone to the office of their attorney with the money in her pocketbook. The attorney told her the abstract of title was not right and they might have to wait for it. She got "scared to keep it at home" and she and her husband took it to the bank.

Frank L. Vlach testified that the usual method of handling money that was not to become a deposit of the bank was to put it in an envelope for safe-keeping and not to mingle that money with other deposits. He testified that he does not even recall how the money came into the bank for which the cashier's check was issued; that cashier's checks were issued to the number of 15, 20 or 50 each day; that he knows the Demoffs but does not remember any conversation with them or either of them about the matter involved here; if the fund had been left with instructions to hold for a specific purpose, a cashier's check would not have been issued.

"The burden of proving the existence of a trust rests on the person asserting it, and he must prove it by clear and satisfactory evidence, having in view all the surrounding facts and circumstances and the intention of the parties." 26 R. C. L. 1203, sec. 44.

The evidence, which we believe we have faithfully abstracted, is very lacking in the elements necessary to establish a trust against the bank. Even under the testimony of appellees, there was nothing establishing an ac-

ceptance of the money as a special deposit or special fund or indicating that the bank knew the purpose or intent except that Mr. Demoff told Vlach he intended to use the fund to buy some property and wanted to leave it ten days. The conventional thing to do was to issue a cashier's check to aid one to carry out such a purpose. The statement of the intent of Demoff was merely incidental. It does not raise an agreement that the fund should become a trust and that claimants should have priority when the bank failed leaving appellees as the holders of the cashier's check. The appellees have failed to sustain the burden of proof.

It follows that the district court erred in decreeing the balance due appellees to be a trust fund. The judgment is reversed, with directions to classify and order the claim paid as a general deposit, as originally classed by the receiver.

REVERSED.

JESS VOHLAND, APPELLEE, V. JOHN BARRON, APPELLANT.

FILED FEBRUARY 8, 1934. No. 28812.

Appeal. When a jury is waived and a law action is tried to the court, findings of fact have the same effect as findings of a jury. They will not be set aside unless clearly wrong.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

A. J. Luebs, for appellant.

George A. Munro, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

GOSS, C. J.

Plaintiff alleged that in the fall of 1931, at the special instance and request of defendant, he plowed 30 acres on defendant's farm; that the reasonable value of the work

was $1.50 an acre; that defendant was unresponsive to demand for payment, and plaintiff prays judgment for $45.

Defendant generally denies the petition and counterclaims, setting up a written lease of the quarter section to plaintiff for one year from March 1, 1931, at a cash rental of $50 for the buildings and pasture and two-fifths of all grain crops to be delivered at Gibbon; that plaintiff neglected to husk the corn within a reasonable time after it matured, that 60 bushels thereof was not picked by plaintiff, and defendant husked it at a cost of $1.80; that defendant's rent share of 440 bushels was negligently husked and delivered at the market too late, and damaged plaintiff 15 cents a bushel because of a decline in the market value, this damage totaling $65; that plaintiff violated his written lease, in which he agreed to protect all buildings and improvements, by removing siding from the house, by cutting holes in the plaster, by tearing down shelving and breaking windows, thus damaging defendant in the sum of $25; that plaintiff failed to haul out and spread the manure accumulated in the barns, as required by the written lease; that defendant had to do this and was thus damaged in the sum of $5. Defendant prayed judgment against plaintiff for $96.80.

Plaintiff's reply was a general denial.

On the trial both parties waived a jury and the case was tried to the court. The court found $39 due plaintiff on his cause of action, allowed defendant $1.80 for picking corn and $4 for cleaning manure from the barn; and entered judgment for plaintiff for $33.20. Defendant appealed.

Appellant says the court erred in rendering judgment immediately after the parties rested, without giving defendant an opportunity to address the court and submit arguments. The brief does not point out the evidence of such procedure on the part of the court nor do we dis-

cover it in the record. The assignment does not appear to be meritorious.

Appellant assigns error of the court in "entering upon the docket an order overruling a motion for a new trial before such motion was made by the defendant." The record shows that the motion was filed on January 10, 1933, and that "afterwards on the 10th day of January, 1933," the journal entry overruling the motion for new trial was entered on the journal. Appellant did not bring up any "docket" entry. The journal entry as shown by the transcript defeats this assignment.

All other assignments of error may be summarized as presenting one question, namely, that the evidence was insufficient to support the judgment. There was evidence to support the findings of the trial court. It has long been the rule that, when a jury is waived and a law action is tried to the court, findings of fact have the same effect as findings by the jury. They will not be set aside unless clearly wrong.

We find no error. The judgment is

AFFIRMED.

LYDIA G. BRADLEY, APPELLEE, V. CLARENCE J. BRADLEY, APPELLANT.

FILED FEBRUARY 8, 1934. No. 28748.

1. Divorce: CUSTODY OF CHILD. In litigation between parents, after they have been separated by divorce, over the custody of a minor child, the determining issue is the best interests of the child.
2. ———: ———. A decree granting a husband a divorce and awarding him the custody of a minor child may, after changed conditions, be modified to change the custody to the mother, if found to be for the best interests of the child.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

Patrick & Smith, for appellant.

Sam E. Klaver, Gray & Brumbaugh and *Webb, Kelley & Lewis, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

ROSE, J.

Lydia G. Bradley, plaintiff, and Clarence J. Bradley, defendant, were married December 24, 1914. They have two sons, Robert W. and Carl M. In the district court for Douglas county plaintiff sued defendant for a divorce. On a cross-petition defendant, the husband, procured a divorce October 26, 1931, and custody of the two sons was committed to him. By the decree the mother was permitted to visit her sons at proper times and places. In the same case plaintiff filed a supplemental petition September 14, 1932, in which she pleaded that defendant violated the decree by preventing her from visiting her sons, Robert then being 17 and Carl 13; that both defendant and Robert beat and otherwise mistreated Carl; that defendant's home was not a fit place for Carl who left his father and went to the home of his mother; that conditions have changed since Carl was committed to the custody of defendant; that the mother is a fit person to have the care and custody of her son Carl; that she has a suitable place for him with proper surroundings; that his best interests and welfare require a change of custody, for which she prays with an allowance for his support.

Defendant denied the alleged facts on which plaintiff sought the custody of her son Carl and an allowance for his support.

After a long trial the district court found generally the issues in favor of plaintiff; that the facts stated in the supplemental petition of plaintiff were established by the evidence; that the best interests of the minor son Carl required a change of custody from his father to his mother; that the change in conditions between the date of the first decree and the filing of the supplemental petition warranted such a change in custody; that defendant

is able to pay $4.50 a week for the support of his son Carl. From a judgment modifying the original decree to conform to the findings under changed conditions and requiring defendant to contribute $4.50 a week for the support of Carl until the further order of the court, defendant appealed.

The best interest of the child is the determining question on appeal, as it was on the trial below. The judge who granted the divorce and awarded the custody of the two minors to their father was the same judge who modified the original decree. When the modifying judgment was entered, Carl was 14 years of age—old enough to nominate his own guardian. Comp. St. 1929, sec. 38-104. He was discontented in the home of his father and brother, who cruelly beat and otherwise mistreated him. He refused to live with them and went to his mother who was kind to him and shared with him her meager earnings by honest labor.

A discussion of the evidence would not benefit either parent or either child nor add anything to the law relating to infants and parent and child.

Upon a trial *de novo,* the opinion is unanimous that the trial court made correct findings and they are adopted on appeal as the proper deductions from the evidence.

AFFIRMED.

JAMES MOST, APPELLEE, V. CEDAR COUNTY, APPELLANT.

FILED FEBRUARY 8, 1934. No. 28783.

1. Automobiles: OPERATION: MAINTENANCE OF ROADS. It is the duty of a county to keep county roads in repair and for that purpose road tractors and maintainers may be operated on the left-hand side of a road in the face of traffic, when necessary.
2. Appeal: DIRECTION OF VERDICT. Where the evidence is insufficient to sustain a judgment in favor of plaintiff, failure to direct a verdict in favor of defendant may be reversible error.
3. Automobiles. Highway privileges of motorists require respect for the equal rights of others in the use of public roads.

4. ———: OPERATION: NEGLIGENCE. It is a general principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead and the rule applies to driving in the daytime where vision is shortened by storms or other physical conditions.

APPEAL from the district court for Cedar county: MARK J. RYAN, JUDGE. *Reversed and dismissed.*

Clarence E. Haley, for appellant.

Carlos W. Goltz and *Alfred Pizey, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

ROSE, J.

This is an action to recover damages in the sum of $17,600, for alleged negligence resulting in personal injuries. James Most, a minor 19 years of age, by his father, his next friend, Forrest Most, is plaintiff. Cedar county is defendant. In the daytime, July 8, 1932, while plaintiff, on a motor-cycle, was traveling westward a short distance east of Belden on a county highway, he collided with a county road maintainer that was going eastward and was severely injured. The negligence imputed to Cedar county is that its maintainer, without warning by horn, flag or other means, came up a hill to the top on the wrong, left-hand or north side of the road, as plaintiff, without negligence, approached the top of the hill from the east on the same side of the road, where he could not see the maintainer in time to prevent a collision. Defendant denied the negligence charged by plaintiff and pleaded that his injuries were caused by his own negligence. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $1,500. From a judgment therefor defendant appealed.

It is argued by defendant that plaintiff did not prove his case, that the uncontradicted evidence shows his in-

juries were caused by his own negligence, and that the district court erred in failing to direct a nonsuit. It is the duty of a county to keep county roads in repair and for that purpose necessary road machinery or suitable equipment may be used, even in the face of traffic on the left-hand side of the road. The road machinery with which plaintiff collided consisted of a tractor in front and a maintainer in the rear, each operated by a different employee of the county. On the maintainer a steel blade attached to a diagonal moldboard 16 feet and 3 inches in length extended into the improved roadway from the left-hand or north side about 12 feet and between 3 and 4 feet beyond the tractor. There was a flag 45 inches above the ground on the outer end of the blade. There is no evidence that this equipment was unsuitable for the purpose of repairing roads or that the county was negligent in using it or that it was negligently operated. The evidence does show, however, that there was no horn on the tractor, but the absence of a horn, if required by law, did not prove actionable negligence of defendant, for the reason that plaintiff's own testimony shows that if the operator of the tractor, whose attention was directed to his work, had sounded a horn at the instant plaintiff came into view, the accident could not thus have been prevented. Evidence that it was necessary to operate the maintainer on the left-hand side of the road in the face of traffic is uncontradicted. In broad daylight the road equipment evidenced itself in operation on the highway. At the time of the accident the tractor, moving no faster than five miles an hour, was ascending the hill from the west near the top, from which the road sloped down steep grades both east and west. The road there was in a proper condition for travel. The testimony of plaintiff shows that, traveling west, he came to the top of the hill at the speed of 30 miles an hour and that after he first saw the tractor he was going so fast that he did not have time to stop or turn far enough aside in order to prevent a collision. His testimony shows further that

he turned sharply to his left, applied the brakes and released the clutch. It was shown by uncontradicted evidence that his motor-cycle struck the moldboard or blade at the south end and flew through the air 45 feet and with plaintiff came to rest at a bank on the south side of the road. There was ample room for plaintiff to pass the maintainer on the south side at a safe pace. Two automobiles, going west, safely passed it where it stood shortly after the accident. The maintainer was in operation where the county had a right to use it. It would have occupied the same space in the road had it been going west instead of east. Plaintiff did not prove actionable negligence. The district court erred in failing to direct a verdict in favor of defendant on that ground.

A nonsuit should also have been directed on the ground that the negligence of plaintiff was the proximate cause of the accident and of his resulting injuries. On a 500-pound motor-cycle that could be driven at a speed of 90 miles an hour, plaintiff ascended the steep hill at a speed of at least 30 miles an hour, where he could not see the road immediately ahead beyond the top of the hill. He had no right to presume that, beyond his vision, the road on his right-hand or north side would be free from obstructions on the west side of the hill. It would have been safer for him to assume that danger lurked at the unseen place, if approached at a high speed, and to slacken his pace until he could safely pass objects in his path or stop without colliding with them. A motorist on an unpaved country road knows that it needs constant attention and repairs; that men with road machines and materials may be lawfully at work any where, occupying all or part of the main roadway in ravines or behind hills; that animals from farms may stray into the highways; that trucks and automobiles, without negligence of drivers, may be standing on either side of the highway when there has not yet been time for warnings of danger; that men, women and children have a right to use the highways everywhere. Highway privileges of motorists

require respect for the equal rights of others in the use of public roads.

It is a firmly established general principle, with exceptions not applicable to the present case, that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead. The cases stating and applying this rule are collected in notes in 44 A. L. R. 1403; 58 A. L. R. 1493; 87 A. L. R. 900. The rule applies to driving in the daytime where vision is shortened by storms or other physical conditions. For the reasons given, the judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

CITIZENS STATE BANK, APPELLEE, V. ARAPAHOE FLOUR MILLS: GEORGE W. SHAFER, APPELLANT.

FILED FEBRUARY 8, 1934. No. 28805.

Bills and Notes: INDORSEMENT: CONSIDERATION. Extension of time on obligation of a corporation is sufficient consideration for indorsement as surety of one who is president and large stockholder.

APPEAL from the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Stevens & Stevens, for appellant.

Butler & James and *George C. Proud, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

DAY, J.

This is an action to recover on a promissory note brought by the Citizens State Bank of Arapahoe against the Arapahoe Flour Mills, a corporation, and George W.

Shafer. At the close of all the testimony, the trial court sustained a motion to discharge the jury and enter judgment in favor of plaintiff against Arapahoe Flour Mills and Shafer. Only Shafer appeals.

The action is founded upon a promissory note, signed "Arapahoe Flour Mills, by G. W. Shafer, Pres., Clyde S. Paine, Sec., and G. W. Shafer." The defendant answered that he thought he was signing only in the representative capacity as president; that he signed it without consideration; and that his signature was procured by fraud.

The note itself refutes beyond doubt that Shafer signed the note only in a representative capacity. The contention of defendant's business incompetence is not persuasive. He had regular and frequent legal advice from a reputable and able lawyer. The mill owed him money, and he was shrewd enough to get a mortgage on its property. He had never been adjudged incompetent. Unfortunately for him, as for many others, business transactions resulted disastrously.

It appears that the note herein was a renewal of an obligation of the mill, upon which Shafer was not liable. But since this obligation had been created, Shafer had secured a mortgage on the mill property. The bank had extended credit at a time when this property was clear. Shafer as president informed the bank that the mill could not pay the note when due and asked for an extension. Shafer was a large stockholder in the mill. A ninety-day extension was granted by the bank and this note executed upon the agreement that Shafer would sign personally, which he did. There is no issue of fact upon this phase of the case. The defendant himself corroborates the testimony of the managing officer of the bank but states that he thought he was signing another note upon which he was already personally liable.

Shafer was a stockholder and president of the mill. As such, he was financially interested in the mill. He desired an extension of time on the mill's debt. Extension of time on the obligation of a corporation is a sufficient con-

sideration for the indorsement as surety of one who is president and large stockholder. *Fulton v. Loughlin*, 118 Ind. 286; 8 C. J. 220. For analogous cases, see *Vybiral v. Maly*, 123 Neb. 436; *Bliss v. Venner*, 121 Neb. 44.

The evidence relating to the allegation of fraud is insufficient to submit to the jury.

The judgment of the trial court is correct.

AFFIRMED.

CITIZENS STATE BANK, APPELLEE, V. GEORGE W. SHAFER, APPELLANT.

FILED FEBRUARY 8, 1934. No. 28821.

APPEAL from the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Stevens & Stevens, for appellant.

Butler & James and *George C. Proud, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

DAY, J.

This is an action to recover on a promissory note against two comakers. A jury was waived and the case tried to the court. The court found for plaintiff and against both defendants, Shafer and another. Only Shafer appeals.

The note was executed by the defendants in connection with the affairs of the Arapahoe Flour Mills. The defendants were officers and stockholders in the mill corporation. It appears that they wished to gain control of the management of the corporation and to divest one who had been in control as the owner of a large number of shares of stock. They sought to do this by acquiring this stock which had been deposited as collateral for a note by payment of the note and assignment of the col-

lateral. This was accomplished by the defendants executing the note herein as payment.

The defense to the note is that it was signed as an officer of the mill and not as an individual; that there was want of consideration and that it was procured by fraud. A brief substantial statement of the evidence will be sufficient to establish the correctness of the judgment of the trial court. In this case, if there is evidence to support the judgment, the finding of the trial court will not be disturbed. This is so well established in this jurisdiction that citation of authorities would be superfluous. The defendant signed the note individually and not as officer of the corporation. After signing the note and by reason thereof, the makers secured stock of the corporation of the par value of $25,000, half of which was transferred to the appellant's name on the books of the company and thereafter voted by him at stockholders' meetings. This secured control of the corporation, which control was exercised by discharging the former owner of the stock as general manager of the corporation's business. This was consideration for the note. It was a personal deal of the individual and not one of the corporation. There is evidence that the transaction was to be handled otherwise, which is denied by other evidence. But it is disclosed that it was not so handled. A careful examination of the entire record, the assignment of errors presented, and the briefs of the parties disclose no errors, so that the judgment should stand.

AFFIRMED.

RACHEL WHINNERY, APPELLEE, V. INTERSTATE TRANSIT LINES, APPELLANT.

FILED FEBRUARY 8, 1934. No. 28794.

1. Trial: INSTRUCTIONS. The instructions of the court to the jury are to be read and considered together, in reference to their subject-matter and any included reference to other in-

structions. If, so considered, they properly state the law of the case, they will be held sufficient.

2. ———: ———. Certain instructions examined and the giving thereof *held* not erroneous.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

T. W. Bockes, C. B. Matthai and *Fred C. Foster,* for appellant.

Boehmer & Boehmer, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

BLACKLEDGE, District Judge.

This is a suit to recover for personal injuries alleged to have been sustained by plaintiff in a collision on the highway a short distance south of Grand Island, Nebraska, between the car in which plaintiff was riding, driven by one Gunn, and the defendant's passenger bus then driven by its regular driver employed for that purpose. The particular place of the collision was at an intersection of highways.

The evidence clearly establishes that the defendant's bus was traveling southward and, under existing highway regulations, had the right of way over vehicles approaching on the east-west highway. There were at the time cars approaching the intersection from all four directions. The car from the east is said to have stopped at the stop sign. The one from the south slowed down. The car in which plaintiff rode approaching from the west ignored the stop sign and swung into the intersection, attempting to make the turn northward, and collided with the bus which had attempted to swing to the right as offering the only means of possibly avoiding collision, upon the situation becoming apparent to its driver. The actual collision was between the left side of the bus and the left side of the car in which plaintiff rode.

The allegations of negligence which find some support

in the evidence were (1) that the bus was negligently driven at a greater rate of speed than was reasonable and proper, having regard for the condition and use of the road and the traffic thereon; (2) that the bus driver failed to heed the slow sign which stood on the highway as he approached the intersection; (3) that the intersection was one of obstructed vision and the bus driver in approaching exceeded the speed of 15 miles an hour specified by highway regulations in such cases; and (4) that the bus driver failed to stop or slow down after he observed, or should have observed, the situation of the car in which the plaintiff was a passenger.

The answer was a denial and a plea of contributory negligence.

On the trial, negligence of the driver of the car in which plaintiff was riding, by overrunning the stop sign, by failing to yield the right of way, and in cutting the corner as he turned, was abundantly supported in the evidence.

On this appeal complaint is made of the giving of each of the instructions numbers 10, 13, and 14.

The trial court submitted the case to the jury upon 19 instructions. Numbers 1 to 4 covered the issues and burden of proof. Number 5 informed the jury that plaintiff was not responsible for the negligence of the driver of the car in which she rode, but was responsible for her own negligence, and directed the jury's attention to an examination of the question whether plaintiff was aware of acts or omissions of the driver as to which she should have remonstrated, applicable to the question of contributory negligence on her part. Numbers 6 and 7 defined, respectively, the terms preponderance of the evidence and the different degrees of negligence involved. Number 8 gave the rules pertaining to contributory and comparative negligence. Number 9 defined the relative rights of way as between the highways, the duties of drivers respecting slow and stop signs, and told the jury that in this case the statute gave to the defendant's bus the right of way

at the intersection over the car in which plaintiff was riding. Number 11 stated the general rule as to reasonable speed and the duties of drivers to keep to the right on the highway and in turning at intersections, and number 12 that the traffic rules were to be considered, "not that their violation is negligence in itself, but is simply to be considered by you in bearing upon the question of the negligence of the parties." Number 15 covered the last chance doctrine and informed the jury that in such case it was the duty of the bus driver to exercise reasonable care to prevent and avoid the accident. Numbers 16, 17, 18, and 19 covered, respectively, the measure of damage, the question of liability insurance, credibility of witnesses, and a concluding paragraph in reference to considering the evidence and reporting a verdict.

Considering now the objection as to instruction No. 10, the instruction is in the following language:

"There is another provision of our statutes which is applicable to this case and should be applied by you together with the provision of statute just set out and bearing upon the question of the negligence of the parties to this action. This statute provides it shall be *prima facie* lawful for a driver of a vehicle to drive it at a speed not exceeding the following: 'Fifteen miles an hour when approaching within fifty feet and in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last fifty feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all highways entering such intersection for a distance of two hundred feet from such intersection.' "

It is urged that the giving of this instruction was error because there was no evidence to which it was applicable, and that the plat, exhibit 1, introduced by plaintiff, and said to be drawn to scale, shows the view from the route of defendant's bus to have been unobstructed for a distance of about 75 feet from the intersection. Conceding

that the plat furnishes some support for this argument, there was also other evidence which the jury were bound to consider in that connection. There were photographs introduced by both parties of sundry views from different angles of the intersection and of nearby territory and objects. There was also testimony of witnesses directed to this point. The bus driver said it was "kind of" a blind corner and that he approached it at a speed of 25 to 30 miles an hour and did not see the car in which plaintiff rode until it was out in the highway about 50 feet distant from him, and applied his brakes at a distance of approximately 10 feet before the cars hit. Over all was the consideration of the question whether under all the conditions of the road and the traffic at the particular time and place the speed was reasonable and proper. This was evidently in the mind of the trial judge when, upon the conclusion of plaintiff's testimony, in overruling the defendant's motion for a directed verdict, he stated he could not say as a matter of law it was not negligence for the defendant's bus not to slow down. Again at the close of the testimony, specific reference was made to the 15-mile-an-hour rule and the statement reiterated. The instruction by its language was connected with other instructions having to do with the statutory rules, and we conclude that there was sufficient in both pleading and evidence to justify the giving of the instruction.

Instruction No. 13 told the jury that, although the negligence of the driver of the car in which plaintiff was riding could not be imputed to plaintiff, "still that negligence may be considered by you in determining whether under all the circumstances surrounding the accident the defendant's negligence, if any, was the proximate cause of the accident." The criticism offered to this instruction is that the word "should" ought to have been used instead of the word "may" in the above quoted part. Considered in its proper setting, with the statements in the other instructions as to what might or might not properly be considered in determining the question of negligence, we

think that the distinction sought to be made calls for too much refinement of language to be held to be prejudicial error.

Instruction No. 14 had reference to defendant's claim that plaintiff knew that the driver of the car in which she was riding had on prior occasions failed to stop at stop signs, and "if you find from the evidence that this was true then you would be justified in finding that it was her duty to exercise reasonable care to direct his attention to the stop sign on the highway No. 70 as that highway entered highways Nos. 13 and 2." It is urged that this instruction is not complete in that it should have, in addition, told the jury what the penalty for failure on plaintiff's part to use reasonable care would be. The jury had been specifically informed in instruction No. 5 of plaintiff's duty in case she was aware of such acts or omissions of the driver, and that, if she failed in her duty in this regard, then she would be guilty of contributory negligence. This instruction directly followed instruction No. 13, already considered, having reference to the negligence of the driver of this car, and they, together with the provisions of instruction No. 5 and the other instructions having reference to negligence and contributory negligence, sufficiently covered the proposition.

Finally, it is urged that there was error in permitting plaintiff, without preliminary statements of qualification, experience, and observation to state her opinion of the speed of the bus as it approached the car in which she was riding. She stated she felt positive it was going at least 40 miles an hour. The trial court was not very particular in requiring foundation statements from the plaintiff, yet it should not be overlooked in the consideration of the question here that plaintiff had previously testified that, at least from the previous September until the time of the accident in March, she had been driving with this and other drivers between her residence in Grand Island and the school where she taught. This and the general knowledge that, in present times, practically

all persons may reasonably be presumed to have concerning the speed of automobiles would render particular foundation questions on the matter of the speed in this instance of less importance. Also, she was almost immediately thereafter permitted to state, "it was just rushing down upon us with such speed I was terrified and I couldn't tell anything else," which statement stood without protest. Obviously, any statement of the speed could be an estimate only. Other witnesses placed it at from 25 to 35 miles an hour, including the bus driver who said he was driving between 25 and 30. It may be that, strictly considered, a more definite foundation should be required; but, under the circumstances and testimony in this case, we cannot conceive that either the jury could have been misled or the defendant prejudiced by the failure of the trial court to require a more definite foundation for the statement.

The case was one of conflicting claims and evidence. We believe they were fairly submitted to the jury by the trial court. We have herein considered all the assignments of error in appellant's brief and find no prejudicial error therein.

The judgment of the district court is

AFFIRMED.

HOWARD L. CROOK, APPELLEE, V. EDWARD M. O'SHEA, DOING BUSINESS AS O'SHEA MOTOR COMPANY, APPELLANT.

FILED FEBRUARY 8, 1934. No. 28672.

1. **Contracts.** A written order for the purchase of merchandise, or, as in this case, for the purchase of trucks and an acceptance thereof, amounts to a written contract under the laws of this state.
2. **Fraud.** Where fraudulent promises act as the inducement to the execution of a written contract, the remedy is for fraud, and not upon the oral promises as a contractual obligation.

3. ———. An action for damages for breach of contract for failure to furnish employment will not lie where the agreement to furnish employment was in the nature of oral inducements to the execution of a written contract for the sale of merchandise, or, as in this case, the sale of trucks.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed and dismissed.*

Stewart, Stewart & Whitworth, for appellant.

O. B. Clark, William Niklaus and *J. E. Mockett, contra.*

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

YEAGER, District Judge.

This is an action at law by Howard L. Crook, plaintiff, appellee herein, against Edward M. O'Shea, doing business as O'Shea Motor Company, defendant, appellant herein. The petition contains two causes of action.

In the first cause of action, the plaintiff alleged that on the 14th day of April, 1931, he entered into an oral agreement with the defendant, by the terms of which he agreed to pay defendant $818 and the defendant agreed to sell to him one Ford Model "AA" truck and to provide plaintiff with regular, continuous and steady employment with Abel Construction Company, the employment to consist of hauling material from May 1, 1931, until weather conditions rendered road construction work in Nebraska impracticable because of the freezing of materials used in road construction, for which hauling the plaintiff would receive 20 cents a mile for each mile traveled with a loaded truck plus 5 cents extra for the first mile of each trip, and the average daily compensation would be not less than $21.50 over and above the costs of gasoline, lubricating oil and necessary repairs to his truck, and that gasoline and lubricating oil could be purchased from Abel Construction Company at Lincoln wholesale prices. He alleged that, as an inducement and as a part of the negotiations leading to the making of the said contract, the

defendant represented that he had a contract with Abel Construction Company whereby defendant was empowered to make the contract for hauling and for the purchase of gasoline and lubricating oil at wholesale prices; that the plaintiff, pursuant to the said agreement and in consideration of the promises of the defendant, purchased and received the truck and paid the defendant the sum of $818; that the defendant failed and refused to secure employment for the plaintiff with Abel Construction Company, except a certain part time employment for which plaintiff received the sum of $393.11 over and above the cost of gasoline, lubricating oil and repairs, whereas, if he had been furnished employment pursuant to the agreement, he would have collected for his services the sum of $3,590.50; that by reason of the breach of contract on the part of the defendant he has sustained damages in the sum of $2,997.39.

The second cause of action is similar to the first, the material difference being that one Leslie Yost claims to have entered into a contract with the defendant identical with that of the plaintiff herein, except as to dates, description of truck and amount of damages. Yost has assigned his cause of action to the plaintiff and plaintiff has instituted action thereon herein.

The defendant filed a general demurrer to the petition, which was overruled, and thereafter filed an answer in which he alleged that he sold the two Ford trucks in question at the price of $818 each, upon which trucks each of the parties paid down $250 and gave a note with a conditional sales contract for the balance, which notes and contracts were transferred and later foreclosed on account of default in payment of said notes.

A trial to the jury was had, which resulted in a verdict and judgment in favor of plaintiff for $437.50 on his first cause of action and $387.50 on his second cause of action.

If, upon his pleadings and proof, the plaintiff was entitled to a recovery at all, the judgment in his favor was not excessive, so therefore this point requires no discus-

sion. The case must be decided on the question of whether or not the plaintiff set forth or proved or set forth and proved a cause of action recognizable in law.

We have set forth in some detail the issues as presented by the pleadings. With the purpose of supporting these issues as to the first cause of action, the plaintiff has adduced the following uncontroverted facts. On or about April 15, 1931, the plaintiff executed a written order for the purchase of a Ford truck from the defendant at the price of $818 on which he paid $250, leaving a balance of $568 to be paid in twelve monthly instalments of $54 each. The order was obtained by one Wisser, an agent of the defendant. The order was accepted by the defendant and on April 17, 1931, a promissory note and a conditional sales contract were contemporaneously executed by plaintiff and Ana L. Crook, his wife, and accepted by the defendant. The note was for the balance of the purchase price of the truck in question and finance charges and the conditional sales contract covered the same truck. The order, the note and the contract are in usual and customary form and contain no reference to employment.

As to the second cause of action, the evidence in this connection is substantially the same, except as to the dates and amounts and parties executing the instruments referred to. However, in addition, there appears upon the written order the following: "For construction work with Abel Const. Co."

The plaintiff, as has already been noted, seeks to recover for a breach of oral contracts. In support of the claimed contract of employment contained in the first cause of action, the plaintiff testified in part as follows: "Q. What did Mr. Wisser say? A. Well, he says Mr. O'Shea had a contract with Abel Construction Company to place ten new trucks on the job with them with ten men. * * * Q. Go ahead and give the substance of the conversation. A. Mr. O'Shea told me about the job. Q. What did he tell you about it? A. He said he had a contract with Abel to put on ten new trucks with dual

wheels. I told him I had looked at it on the floor and had been talking about it with Mr. Wisser, and he says, 'You will start the first of May and it will be steady, continuous employment until freezing weather sets in, if you are able to finance one of these trucks.' He says I would make $20 to $25 a day, and I told him it sounded all right to me, and he wanted to know if I was able to finance it, and I told him I thought I was, and he wanted to know the price Wisser had made, and I told him $818 and I would have to have $250 down, and he said he didn't want to let any of these go at $250 down but being Mr. Wisser told you that it was O. K. Q. Did he tell you who was furnishing this work to you? A. He told me that he was furnishing the work through the Abel Construction Company. Q. Now, did Mr. O'Shea mention gas or oil? A. Yes. Q. State what he said? A. He said, 'You will also be able to buy gas and oil at wholesale, wholesale Lincoln prices out on the job.' * * * Q. Who did you have that transaction with, with Mr. Wisser or Mr. O'Shea? A. After I accepted the proposition through Mr. O'Shea I signed the order for the truck in the presence of Mr. Wisser."

There is other testimony along the same line, but, in the main, these questions and answers set forth plaintiff's claim with reference to employment and income to be derived therefrom. The plaintiff claims that it was these representations and others of like character and import which caused him to purchase the truck.

As to the second cause of action, Yost, the other contracting party, has testified in part as follows: "Q. Now, I will ask you to state the substance of the conversation between yourself and Mr. Wisser at your home the first part of April, 1931, with respect to employment, if any, by the O'Shea Motor Company, or O'Shea, the defendant. A. Well, he came to my house and told me that Mr. O'Shea had a proposition whereby if I would purchase one of his Model "A" dump trucks Mr. O'Shea would furnish me with a job with the Abel Construction Company and the

work would start May 1st and last until freezing weather occurred which made road work impossible, and he also said that the job would pay $18 to $20 a day, net. Q. Did he tell you in any particular the kind of work it was? A. He said it would be hauling road material for paving and graveling roads. Q. Did he mention where and in what locality the work was to be done? A. He said it was all work that would be in and around Lincoln, near Lincoln, that the Abel Construction Company had several contracts that would furnish plenty of work and Mr. O'Shea had a contract with Abel to furnish this work. Q. Now, did you have any further conversation with Mr. Wisser at that time? A. Yes; he also said that Mr. O'Shea would sell ten trucks, not to exceed ten trucks so that the workmen could be kept busy and so there wouldn't be too many trucks on the job. Q. Did he tell you—did he mention what he meant by 'net?' A. Yes; he said I ought to make $18 to $20 a day net to me, over and above gas and oil. * * * Q. Was there anything other than that said at that time that you recollect? A. Well, he said, 'I have known you a long time, I wouldn't just want to be selling you a truck,' he says, 'Mr. O'Shea has this job and I am sure you can make plenty of money if you have got the money to buy one of these trucks, he will furnish you with a job.' * * * Q. You may state what Mr. O'Shea said in substance as near as you can recall. A. Mr. O'Shea said, 'I have a contract with the Abel Construction Company to furnish ten trucks for hauling road material for the Abel Construction Company,' and he said, if I had the money to buy one of these trucks he would furnish me with a job that would pay me from $18 to $20 a day, net. Q. Did he say how long this job would last? A. Yes. Q. What did he say about that? A. He said it would last from the 1st of May until freezing weather set in so road work was impossible. Q. Did he say what kind of work it was? A. Yes; hauling material, gravel, sand, cement for the Abel Construction Company. * * * Q. You may state whether or not you accepted that

proposition or what you did with respect to what Mr. Wisser and Mr. O'Shea told you? A. Well, I told Mr. O'Shea that if he could furnish me with a job I would buy one of them trucks; if I could make $18 to $20 a day net for that period of time I would be interested."

If defendant is to be bound on a contract of employment with Yost he must be bound on the basis of the language quoted.

What, then, is the force of the language employed between the plaintiff and defendant in the one case and Yost and the defendant in the other? In a view which we think most favorable to plaintiff, it appears that defendant was seeking to sell trucks and in pursuance of such purpose, personally and through an agent, offered his wares for sale and told these two men, as prospective purchasers, that he had a contract with Abel Construction Company to furnish ten trucks and if they purchased trucks he would give them employment with Abel Construction Company where they would continue to be employed until freezing weather and that for their work the Abel Construction Company would pay them on a fixed basis which would net them a certain daily income. Stripped of its gloss and forceless verbiage, this is the commitment of the defendant.

The defendant nowhere binds himself to the payment of any compensation to any person or persons whomsoever. He only promises orally to secure and to procure employment with a third party, which employment will provide a certain return in compensation for such employment, on which promises the plaintiff and Yost relied.

The evidence indicates that the parties would not have purchased the trucks in question in the absence of this commitment of the defendant, or, in other words, that this promise was the impelling force or inducement which brought about the execution and consummation of the contracts of sale of the two trucks.

If, then, the commitments of the defendant were matters of inducement, it therefore is unnecessary for us to

discuss the question of whether the contracts were verbal or written, and likewise a discussion of the parol evidence rules is not in point here, further than to say that the written orders for the trucks in question and acceptance thereof by the defendant were a written contract under the laws of this state.

A lengthy discussion of this subject would serve no useful purpose here. It is sufficient, we think, to say that, when fraudulent promises act as the inducement to the execution of a written contract, the remedy is for fraud, and not upon the oral promise as a contractual obligation. *Schuster v. North American Hotel Co.*, 106 Neb. 679; *Davis v. Ferguson*, 111 Neb. 691. If the plaintiff had any right of action at all, which question we do not determine, it was not for damages for breach of contract for failure to furnish employment.

In the light of the conclusion arrived at, it at once becomes apparent that plaintiff has not sustained the causes of action set forth in his pleadings, and, further, that no suit upon contract or for breach of contract to furnish employment is maintainable, so therefore the decision and judgment of the district court must be reversed and the cause dismissed.

REVERSED AND DISMISSED.

A. J. MILLS, APPELLEE, V. B. O. MILLS ET AL., APPELLANTS.

FILED FEBRUARY 8, 1934. No. 28681.

1. Appeal. This court will not take notice of error in the admission of evidence bearing on an issue not tendered by the pleadings and which does not bear upon any theory upon which the case was tried and which could not otherwise affect the issues presented.
2. Bills and Notes. Where the evidence discloses a substantial conflict on the question of whether or not the indorsers sign for the accommodation of the payee of a promissory note, the determination of such question is for the jury.

3. ———. An accommodation maker or surety of a promissory note is not liable to the party accommodated.

APPEAL from the district court for Hitchcock county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Butler & James and *J. F. Ratcliff,* for appellants.

Scott & Scott, contra.

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

YEAGER, District Judge.

This is a suit instituted for the purpose of recovering on three promissory notes. The plaintiff recovered judgment thereon and the defendants have appealed.

The action as originally instituted was by the appellee, A. J. Mills, against C. E. Mills and the appellants B. O. Mills and J. E. Mills, all brothers, but no service of process was had upon C. E. Mills, so the action proceeded against the appellants.

The petition set forth, in three causes of action, that the defendants were indebted to the plaintiff on the 1st day of February, 1927, in the sums of $765, $500, and $900, and that as an evidence of such indebtedness they executed three promissory notes, one for $765, due January 1, 1928, one for $500, due April 1, 1928, and one for $900, due February 1, 1929, each of which notes bore 8 per cent. interest per annum, payable per annum from date until maturity, and 10 per cent. per annum in case of default at maturity; and that the interest was paid thereon to February 1, 1929, but that nothing was paid thereafter thereon, either by way of interest or principal.

The appellants admitted the execution of the notes sued upon and also that the interest had been paid thereon, as alleged, by C. E. Mills. They alleged as a defense to the suit on the said notes: (1) That the said notes were executed by them only for the accommodation of the appellee, and that they, the appellants, received no consideration for the said notes; and (2) that because of the failure of

the appellee to present the notes in question at the time of maturity he is estopped from claiming that the appellants are liable thereon.

The appellants urge three propositions as a basis for reversal, only two of which require any consideration in this case. They are as follows: (1) The court erred in admitting evidence as to the ownership of the notes in question after sustaining a motion of the appellee for a directed verdict in his favor. (2) There was sufficient evidence on a disputed question of fact as to whether or not the notes in question were signed by them as an accommodation to the appellee to require the submission of that question to a jury.

At the conclusion of the evidence the court sustained a motion made by the plaintiff and appellee for a directed verdict in his favor. After sustaining the motion for a directed verdict the plaintiff was given leave to adduce additional evidence as to the ownership of the notes, the purpose being to show affirmatively that the plaintiff, appellee herein, was the true owner.

Taking the two propositions in their order, on an examination of the record we fail to find in the transcript of the pleadings that any issue was tendered on the question of ownership of the notes, and likewise an examination of the bill of exceptions fails to disclose that the case was tried on any theory not tendered by the pleadings. Therefore, the *prima facie* presumption that the payee in possession of a promissory note not indorsed is presumed to be the actual owner must prevail.

Did, then, the record in the case present an issue of fact on the question of accommodation indorsement which should have been submitted to a jury? On the trial of the case the appellee and the appellants testified. All three witnesses agree on one point of fact and that is that the appellee requested the appellants to sign the notes with C. E. Mills, which request was made out of the presence of C. E. Mills. There is nothing to be found in the record wherein it was stated that C. E. Mills ever

requested the appellants to sign with him. The appellee substantially stated that he asked them to sign because the notes were not considered bankable by the bank with the signature of C. E. Mills alone thereon, since the notes were given for the purchase price of horses which were to be removed to Canada, and that the appellants signed in order that C. E. Mills might obtain the horses. On the other hand, the appellants testified substantially that they signed the notes at the request of the appellee, who represented that he wanted their signatures thereon for the purpose of causing the notes to become acceptable at the bank and in order that appellee might be able to complete his sale of horses; and, further, that appellants would never be called upon to pay the notes.

The only evidence in the record given by the appellants which tends toward an admission that they were anything more than accommodation indorsers for the benefit of the appellee was given in response to three questions, which questions are set out here: "Q. In fact, it was your intention at that time to secure your brother so that he could buy these horses and take them to Canada; is not that right? A. Our understanding was that he just wanted the interest. * * * Q. But the fact is that you signed these notes to help your brother so he could take the horses—take the horses out of the country? A. Yes. * * * Q. Just state, as near as you can recollect, just what was said at that time. A. He wanted to fix the notes * * * and he thought the notes would look better if we would sign with him; it would show up better to satisfy the clerk; that he intended to hold the notes himself, and that he wanted the interest paid; * * * and he did not intend for us to pay them." It must be remembered that these questions and answers have reference to conversations between the appellee and the appellant or appellants and out of the presence of the purchaser of the horses, and, further, the evidence is all to the effect that the purchaser never at any time requested appellants to sign the notes in question. To hold that

this language amounted to an admission of something beyond accommodation to the appellee would give it a meaning beyond its context either taken alone or taken in conjunction with the rest of their testimony which is a clear cut denial of anything except accommodation indorsement for the benefit of the appellee herein.

The sale was had on the last day of January, 1927, and the notes signed the next day at the bank, and at that time they were delivered to the bank, all of which proceedings took place out of the presence of the appellee. Presumably at least these proceedings took place in the presence of some officer of the bank and presumably some conversation took place at that time but no enlightenment is furnished on that point.

The record therefore disclosed that in so far as the appellants are concerned they were accommodation indorsers of the notes in question. There is also disclosed by the evidence a substantial conflict on the question of whether or not they were indorsers for the accommodation of the appellee. This court is committed to the rule that an accommodation maker or surety of a promissory note is not liable to the party accommodated. It is committed to the further rule that where there is a substantial conflict in the evidence as to whether or not the indorsement is for accommodation, then the question is one for a jury.

We are therefore of the opinion that the district court erroneously sustained the motion of the plaintiff for a directed verdict and for judgment for the plaintiff; and that the judgment should be reversed and the cause is remanded.

REVERSED.

RAPER, District Judge, dissents.

CITY OF COZAD, APPELLEE, V. WILLIAM T. THOMPSON ET AL., APPELLANTS.

FILED FEBRUARY 13, 1934. No. 28773.

1. **Appeal.** When a jury is waived and a law action is tried to the court, findings of fact have the same effect as findings of a jury. They will not be set aside unless clearly wrong.
2. **Municipal Corporations:** DEPOSIT OF CITY FUNDS: LIABILITY OF TREASURER. A treasurer of a city of the second class, who is also a stockholder, director and officer of a bank, and who deposits moneys of the city in such bank, knowing it to be insolvent, and that the bank has given no bond for the security of such moneys, and who fails to inform the city of the condition of the bank, is guilty of actionable negligence rendering him liable for such moneys remaining in the bank when taken over by the banking department.
3. ———: ———: LIABILITY OF TREASURER'S SURETY. Likewise, under the facts stated, the treasurer's surety is liable under a bond conditioned that the treasurer will promptly pay over all moneys coming into his hands by virtue of his office and will faithfully discharge all other duties of his office.
4. **Estoppel.** A municipality is not estopped by the unauthorized acts of an officer of limited authority.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Cook & Cook, Montgomery, Hall & Young and *Harvey M. Johnsen,* for appellants.

Halligan, Beatty & Halligan and *Milton C. Murphy, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

GOSS, C. J.

On a trial to the court judgment was rendered against William T. Thompson, former city treasurer, and American Surety Company of New York, surety on his official bond, for principal and interest found due upon the unpaid balance of city deposits made by the treasurer in Farmers State Bank of Cozad when that bank was in-

solvent, and while Thompson was admittedly a stockholder, director and officer of the bank. Defendants appealed.

Thompson was elected city treasurer for a term of two years commencing May 1, 1928. His official bond for $10,000 was executed by himself and by the surety company on April 9, 1928. It contracted to protect the city for "two years from May 1, 1928, and until his successor is duly elected and qualified" and contained the following: "Now, therefore, if the said W. T. Thompson, Jr., shall render a true and just account of his office and doings therein to the proper authority, when required thereby or by law, and shall promptly pay over to the person or officer entitled thereto all moneys which may come into his hands by virtue of said office, and shall faithfully account for all balances of money remaining in his hands at the termination of his term of office, and shall hereafter exercise all reasonable care and diligence in the preservation and lawful disposal of all books, papers and securities, or other property appertaining and belonging to his said office, and deliver them to his successor or to any person or party authorized by law to receive the same; and if he shall faithfully and impartially, without fear, favor, fraud or oppression, discharge all other duties now or hereafter required of him as such an officer by law, then this obligation to be null and void, otherwise to be and remain in full force and effect."

The petition was bottomed upon the theory that the treasurer knew the bank was insolvent and an unsafe depository for city money but, with gross negligence and without regard to the welfare of the city, deposited its money in the bank and allowed it to remain there for his own benefit and for the purpose of assisting the bank financially.

On May 20, 1929, the bank was taken over by the guaranty fund commission as insolvent. When Thompson took office the bank held deposits of city money amounting to $3,962.37. On May 20, 1929, these deposits amounted to $7,786.54. Pursuant to a reorganization plan agreed

to by more than 85 per cent. of depositors and unsecured creditors, under section 8-181, Comp. St. 1929, the bank was reorganized, with the approval of the banking department, and was reopened on July 3, 1929. The old capital stock was canceled, 500 new shares were issued and paid for at $120 a share, depositors and creditors scaled their credits 50 per cent. and were allowed the slow and doubtful assets, to be liquidated by a trustee. The plaintiff did not join in the reorganization agreement but was paid 50 per cent. of its deposits. This action was brought to recover from Thompson and his surety the balance due the city, which had been charged off when the bank reorganized. The payment by the bank and smaller payments by the trustee so reduced the balance due from Thompson to the city that it amounted to $3,036.78. The court allowed interest at 7 per cent. on this sum from May 1, 1930, and rendered judgment against defendants on September 26, 1932, for $3,585.78.

By stipulation of the parties, jury trial was waived and the cause was tried to the court. When a jury is waived and a law action is tried to the court, findings of fact by the court have the same effect as findings of a jury. They will not be set aside on review unless clearly wrong.

Without reciting the evidence, it is sufficient to support the conclusion that at least from May 1, 1929, to the end of his term a year later, the bank was insolvent, and Thompson, as one of its active officers, knew it. See *Westbrook v. State,* 120 Neb. 625. What he knew as a banker he knew as a treasurer. Yet, as treasurer, he continued to use the bank as a depository of city funds and failed to inform the city authorities of the unsafe condition of the bank. The city claims this was a violation of the condition of his bond and was actionable neglect of his official duty.

The bank had been designated as a depository of city funds but had not given any bond to secure the city deposits. Under the law then existing state banks were,

by statute, exempted from the requirement to give bond imposed upon other banks. Comp. St. 1929, sec. 17-515. This exemption was removed in 1931. Laws 1931, ch. 33, Comp. St. Supp. 1933, sec. 17-515. Appellants argue that the designation of the bank as a depository relieved the treasurer from liability for funds lost in this insolvent bank. They cite section 17-515, Comp. St. 1929, as supporting this proposition. The implication of that section results, ordinarily, in that rule in the case of a treasurer whose depository has been duly selected and who has faithfully exercised his duties to the city; but the matter at issue goes deeper than that, for the city charges a violation of his duty, expressed in the condition of his bond, that he will "faithfully and impartially, without fear, favor, fraud or oppression, discharge all other duties now or hereafter required of him as such an officer by law," in that, knowing the bank was unsafe, he did not inform his principal as to the insolvent condition of the bank but continued to deposit the city funds in the bank. On this point the defendants also cite section 77-2513, Comp. St. 1929. It says: "No treasurer shall be liable on his bond for money on deposit in bank under and by direction of the proper legal authority if the bank has given bond." Here the bank had not given any bond to the city. Hence, the section does not apply.

A city treasurer was also assistant cashier of a bank in which he deposited city funds knowing the bank was insolvent. His surety bond was very similar to the bond involved here. The court held that "there was such bad faith or lack of diligence on the treasurer's part as to render him and surety on his official bond liable for loss on bank failing." *City of Wessington Springs v. Smith*, 54 S. Dak. 515. Closely following that case came another South Dakota decision, to the effect that, when a treasurer knowingly deposits his principal's money in a failing bank, he commits a "breach of duty, for which he was liable on common-law principles and under statute, and for which surety was liable by virtue of contract."

Independent School District v. Flittie, 54 S. Dak. 526. A commissioner of finance and revenue of a city who, knowing a bank in which city funds are on deposit was in a poor financial condition, allowed the funds to remain was guilty of "a neglect of duty for which his surety was liable under the bond given it (the city) guaranteeing to save the city harmless from loss caused by his neglect of duty." *City of Topeka v. Independence Indemnity Co.,* 130 Kan. 651.

"The great weight of authority is in favor of holding public officers handling public funds to a much stricter accountability than fiduciaries for the loss of private funds. The liability of a collector or receiver of public moneys is in a majority of jurisdictions that of an insurer. He is answerable in all events. The theory on which the doctrine is based is that a public officer having public moneys in charge is a debtor bound to account and pay over the exact sums received. His liability is not regulated by the law of bailment. The basis of this rule is public policy." 22 R. C. L. 226, sec. 5.

Appellants argue that section 8-181, Comp. St. 1929, requiring the depositors, not joining in a reorganization agreement signed by 85 per cent. of the unsecured creditors, to be bound thereby is unconstitutional and void under the due process and contract impairment clauses. We do not regard these questions as involved in this action. Thompson deposited the money in the bank and the account ran in his name as city treasurer. It was money collected by him as such officer which he and his surety agreed by the terms of their bond to turn over to the city. When the bank reorganized, the city refused to approve the reorganization plan and did not join the creditors therein. This action is based upon Thompson's direct liability to pay to the city all moneys coming into his hands, and upon the contract of his surety to stand behind him in that duty. So the constitutionality of the section questioned, not being involved, is not decided here.

Appellants assign error because the court refused to allow them to amend their respective answers so as to plead estoppel against the city arising out of the receipt of the two dividends from Peter Jensen, trustee, collected by him out of the part of the assets of the bank not taken over by the reorganized bank. It is argued that this was a ratification of the depositor's contract and estopped the city; and that the city has destroyed the defendants' right of subrogation against the bank and should not be permitted to recover. Considering these amendments as allowed, we do not think they would accomplish the result claimed. The city council never ratified the acts of Thompson and his successor in office in receiving the dividends from the trustee. The council has at all times refused to accept the money and to ratify or approve. In the petition the allegations and prayer were for the full half of the amount in the bank when it closed. The dividend was received by or on behalf of Thompson and not by the city, but he caused it to be turned over to the city. He could not bind the city to the reorganization plan. The court decreed that this money was a credit due Thompson and his surety and rendered judgment for the balance due, thus giving both the credit for the dividends.

No estoppel of a municipality can grow out of dealings with public officers of limited authority. A municipality is not estopped by the unauthorized acts of its officer or agent. 10 R. C. L. 707, sec. 35. Thompson, the treasurer, had the city money in the insolvent bank. The city refused to join in the reorganization of the bank, relying upon the treasurer and his surety to restore the money. Thompson could not bind the city to the plan, a part of which was to join in a trust to collect for depositors whatever was collectible on poor assets taken out of the bank at the time of its reorganization. The city had a right to take from Thompson or on his behalf whatever he secured by his own arrangement with the trustee and other depositors of the bank. The mere fact that the city

had been charged by the trial court with these payments does not work an estoppel against the city in view of its consistent attitude up to that point.

Lastly, the decree is criticized because it allowed interest from May 1, 1930, on the $3,036.78 balance Thompson did not have on hand and which so far has not been paid. That was the date on which his term expired and the date recited in his surety bond as the end of his term. While the bank had been taken over by the department on May 20, 1929, the trial court allowed interest only from the end of the term on the above sum withheld by the treasurer. In this we find no error.

The judgment of the district court is

AFFIRMED.

S. J. LARSON ET AL., APPELLEES, V. JULIUS BUMANN, APPELLANT.

FILED FEBRUARY 13, 1934. No. 28715.

1. **Appeal:** DIRECTION OF VERDICT. Where each party to an action at law requests a peremptory instruction in his favor after the evidence has all been adduced on both sides, a direction by the trial court to the jury in favor of plaintiff is equivalent on appeal to a verdict in his favor on every material issue of fact.
2. **Subrogation.** When the facts warrant, a surety who pays the debt of his principal may by subrogation acquire collateral security held by the creditor for payment of the debt and maintain an action on such security.

APPEAL from the district court for Knox county: DE WITT C. CHASE, JUDGE. *Affirmed.*

Hutton & Mueting, for appellant.

Fred S. Berry, W. A. Meserve and *P. H. Peterson, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

ROSE, J.

This is an action on a 1,000-dollar promissory note dated April 24, 1925. The First National Bank of Wausa was payee and Julius Bumann was maker. S. J. Larson, Fred Frevert, Olof Olson, A. W. Stenberg, Emil Bumann, August Mord and Emil Engdahl are plaintiffs. Julius Bumann, maker, is defendant. Plaintiffs pleaded that, for a valuable consideration, payee, before maturity of the note, indorsed it without recourse and delivered it to the First National Bank of Omaha, an innocent purchaser and holder in due course of business without knowledge or notice of any defense to it, and that the indorsee named sold and delivered it to plaintiffs for $1,000.

In an answer to the petition defendant denied that plaintiffs were owners or holders of the note and alleged in detail the following facts: The note in suit was a renewal of an original note executed October 15, 1924, for five shares of stock in the First National Bank of Wausa. To protect their own interests, plaintiffs, who were interested in that bank, engaged in a joint enterprise to reorganize it, the reserve having become impaired. It was alleged further in the answer that plaintiffs falsely represented to defendant they were organizing a new bank by selling new stock; that defendant believed the false representations, relied on them and purchased five shares; that defendant did not receive new stock in a new bank, but gave his note for stock which was worthless. He pleaded further that the note in suit was pledged by the original payee as collateral security for money lent to plaintiffs by the First National Bank of Omaha.

A reply put in issue facts alleged as defenses.

Upon a trial of the issues the district court directed a verdict in favor of plaintiffs for $1,730 which the jury rendered. From a judgment therefor defendant appealed.

After the evidence had been adduced on both sides, each party requested a peremptory instruction in his favor. In this situation the direction to the jury to render a verdict for plaintiffs was equivalent to general findings by the

trial court in their favor on every material issue of fact. On appeal such findings have the same effect as if voluntarily made by the jury. The sufficiency of the evidence to sustain the judgment is the question presented on the issues of fact. *Knies v. Lang*, 116 Neb. 387, and cases cited in the opinion.

For convenience, the First National Bank of Wausa will be called the "Wausa Bank" and the First National Bank of Omaha the "Omaha Bank." The note in suit was executed and delivered by defendant and no part of the debt evidenced by it was ever paid by him. In October, 1924, the reserve of the Wausa Bank was impaired and a federal bank examiner insisted on an improvement of its condition. A plan to reorganize with new capital and officers was adopted. The old stock was surrendered and canceled and new stock was issued. There were 130 purchasers of the new stock, some of them paying for shares with cash, some with checks and others with notes. Five shares were issued to defendant who accepted them and gave in payment his personal note for $1,000 October 15, 1924, payable six months thence to the Wausa Bank, payee. The 1,000-dollar note in suit was executed and delivered by defendant to the Wausa Bank in renewal of his former note for the same amount. Pursuant to the plan adopted, the Wausa Bank was reorganized with new stockholders generally, with new capital furnished in the manner indicated and with new directors and new executive officers in control. The five shares of stock issued to defendant by the Wausa Bank were in the form of a single stock certificate, showing on its face what the stock was and what he procured for his original 1,000-dollar note. His shares represented a proportionate ownership of the reorganized Wausa Bank, which openly continued under federal authority to transact a commercial banking business with the location unchanged. Defendant treated his stock as his own and never surrendered his shares or tendered them back. While resisting judgment on his renewal note, he retained his stock throughout the trial without

any attempt or offer to rescind his contract of purchase. He did not prove his stock was worthless and the evidential facts and circumstances abundantly support the district court's finding that defendant was not induced by fraud to purchase stock or to give his note for it.

Did plaintiffs become the owners of the 1,000-dollar note given by defendant in renewal of the note with which he purchased his stock, including the right to maintain this action? The answer depends on the nature of the transactions through which plaintiffs acquired the note in suit. The propriety of keeping in the Wausa Bank the notes received by it for capital stock was questioned by a federal bank examiner and currency or its equivalent was needed in place of the stock notes. In this situation the Wausa Bank negotiated with the Omaha Bank for a loan of $13,700, which was subsequently made. As part of the transaction the Wausa Bank indorsed, transferred and delivered to the Omaha Bank $13,700 in stock notes. A note for $13,700 by directors of the Wausa Bank, plaintiffs, to the Omaha Bank was also exacted by the latter as a condition of making the loan. Plaintiffs, as individuals, executed their note for $13,700 October 29, 1924, in favor of the Omaha Bank and delivered it to the latter with a number of stock notes aggregating the same amount. Among the stock notes so transferred by the Wausa Bank to the Omaha Bank was defendant's 1,000-dollar note in suit. The amount of the loan was received directly by the Wausa Bank. No plaintiff received any part of it. By means of payments on stock notes in the hands of the Omaha Bank, it received on its loan to the Wausa Bank $6,700, thus reducing the debt to $7,000. April 29, 1925, plaintiffs renewed their 13,700-dollar note to the extent of $7,000 by giving a new one therefor and the Omaha Bank retained stock notes aggregating the amount of the renewal, among them the unpaid renewal note of defendant. Later plaintiffs paid from their individual funds the 7,000-dollar note owing by the Wausa Bank to the Omaha Bank and the latter delivered it to plaintiffs with the unpaid

stock notes remaining in its hands including defendant's note. The evidence of these facts is undisputed and the proper conclusions therefrom, in view of all the circumstances and the real transactions, are as follows: The 13,700-dollar loan was the primary obligation of the Wausa Bank to the Omaha Bank. In the transactions between the two banks plaintiffs were sureties for the Wausa Bank, the principal debtor. When plaintiffs, the sureties, paid to the Omaha Bank from their individual funds the remainder of the loan, or $7,000, they acquired the unpaid stock notes then remaining in the hands of the Omaha Bank, including the right to recover the amount due on the 1,000-dollar stock note of defendant, to which there was no valid defense. When the facts warrant, a surety who pays the debt of his principal may by subrogation acquire collateral security held by the creditor for payment of the debt and maintain an action on such security.

These conclusions will not subject defendant to a double liability on his note. The Wausa Bank, maker, indorsed it to the Omaha Bank without recourse and delivered it to the indorsee in good faith. The $13,700 received by the Wausa Bank by means of the loan for that amount included the proceeds of the sale of defendant's note to the Omaha Bank. The debt evidenced by it is now owing to plaintiffs alone. The evidence sustains the judgment.

AFFIRMED.

HERMAN ACKMANN ET AL., APELLANTS, V. HATTIE ACKMANN: E. G. DRAKE, APPELLEE.

FILED FEBRUARY 13, 1934. No. 28804.

1. Wills. The right of a childless devisee to mortgage land willed to him in fee by his father *held* not defeated by a later provision in the same will that, upon the death of any one of testator's children without leaving a child and without conveying such land, it shall be divided equally among testator's surviving children.

2. ———. The right of a devisee to "convey" land willed to him in fee may include the right to mortgage it.

APPEAL from the district court for Jefferson county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

E. A. Wunder, for appellants.

Rinaker & Delehant and *M. S. Hevelone, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and BEGLEY, District Judge.

ROSE, J.

This is an action in which there is a prayer by plaintiffs for the construction of a will and for the cancelation of a mortgage as a cloud on a tract of land. The district court sustained a demurrer to the petition. Plaintiffs refused to plead further and the action was dismissed. From the judgment of dismissal plaintiffs appealed.

The will in controversy was executed by Ferdinand Ackmann who died October 25, 1917, leaving surviving him his widow and 12 children. The will was probated December 6, 1917. Testator had acquired title to the land described in the petition March 2, 1907. Ten of testator's children are plaintiffs. Of the other two, Emil Ackmann, son, has no interest in the mortgaged land and William F. Ackmann, son and devisee, died childless November 5, 1931. The principal defendant is E. G. Drake, to whom the land involved was mortgaged by William F. Ackmann for $3,000 February 27, 1930.

The second paragraph of the will bequeaths to Caroline Ackmann, wife of testator, his personal property and devises to her a life estate in his real property. In each of several other paragraphs of the will, land is devised by testator to a child, subject to the life estate of testator's wife, who died June 21, 1929. Some devises of remainders were limited by the clause, "without any power or right" in the devisee "to sell, mortgage or otherwise encumber said land." The facts summarized are stated at length in the petition which contains a copy of the will. The fourth

and fifteenth paragraphs of the will are as follows:

"Fourth. To my son William F. Ackmann I give and devise the east half of the northeast quarter of the northwest quarter and the south half of the said northwest quarter of section eight in township three, range three, in Jefferson county, to have and to hold the same to the said William F. Ackmann and his heirs and assigns forever but subject to the rights of my said wife in paragraph two hereto."

"Fifteenth. In the event that any of my said children shall die without leaving any child surviving and without having conveyed the real estate herein then it is my will that said real estate belonging to said deceased shall be divided equally among my other children then living, and surviving child or children of any deceased child."

The land described in the fourth paragraph of the will is the tract in controversy. The fee was thereby granted to devisee "to have and to hold the same to the said William F. Ackmann and his heirs and assigns forever," subject only to the life estate of his mother, which was extinguished by her death June 21, 1929. The mortgage was executed at a later date and William F. Ackmann died childless November 5, 1931. Plaintiffs claim his land unencumbered by the mortgage. They take the position that the devises to the children and the fifteenth paragraph should be construed together, that the will so construed vested in each surviving child a defeasible or determinable fee and that the contingencies and conditions were defeated by the fifteenth paragraph. This position seems to be untenable and the cases cited in support of it inapplicable, except as to construing the will in its entirety.

The fourth devise wills the land to devisee subject only to the life estate, since extinguished. This devise includes the power to sell and convey. Under the fifteenth paragraph, it is only in the event of the death of a childless devisee that his land shall be divided equally among the other children of testator. The later paragraph recognizes the devise of the fee in the fourth. Real estate belonging

to decedent is what is to be divided among other heirs, in the event of the death of devisee without leaving a child. Death of devisee "without having conveyed the real estate" is a condition of division among the other children. Construing the two provisions together in connection with the entire will, it is clear that the later provision does not cut down the former grant to convey. Ownership and title creating the right to convey land include the lawful right to mortgage it. While a "mortgage," in a technical sense, is not a deed conveying land, it is a "conveyance" in the common use of that word—the sense in which it was used in the will. In *Potter v. Vernon,* 129 Okla. 251, the court said:

"Under the general rule that all instruments affecting real estate are included under the word 'conveyance,' are included the following: A mortgage of an equitable interest (*Sullivan v. Corn Exchange Bank,* 154 App. Div. 292, 139 N. Y. S. 97); a leasehold (*Lembeck, etc., Eagle Brewing Co. v. Kelly,* 63 N. J. Eq. 401, 406, 51 Atl. 794); of personal property (*Patterson v. Jones,* 89 Ala. 388, 390, 8 So. 77); an agreement to execute a mortgage (*In re Wright's Mortg. Trust,* L. R. 16 Eq. 41, 46); an assignment for the benefit of creditors (*Prouty v. Clark,* 73 Iowa, 55, 56, 34 N. W. 614); an assignment of a chose in action (*Wilson v. Beadle,* 2 Head (Tenn.) 510); the satisfaction of a mortgage (*Foss v. Dullam,* 111 Minn. 220, 126 N. W. 820); an instrument in the nature of a trust deed, even without a seal, acknowledgment or witness (*White v. Fitzgerald,* 19 Wis. 480); a release, as an instrument by which the title to real estate might be affected in law or equity (*Palmer v. Bates,* 22 Minn. 532); a release of a mortgage (*Baker v. Thomas,* 61 Hun, 17, 15 N. Y. S. 359); or part of land covered by a mortgage (*Merchant v. Woods,* 27 Minn. 396, 7 N. W. 826)."

In executing the mortgage in controversy, William F. Ackmann was within his legal rights under the will. The mortgage created a valid lien. The petition does not state

facts sufficient to show that plaintiffs have title to the land free from the lien of the mortgage. The demurrer was properly sustained and the dismissal is

AFFIRMED.

ELSIE DE COU TROUP, EXECUTRIX, AND LESLIE E. TROUP, ADMINISTRATOR OF THE ESTATE OF ALEXANDER C. TROUP, APPELLANTS, V. NELL PORTER, APPELLEE.

FILED FEBRUARY 13, 1934. No. 28738.

Negligence. Where contributory negligence of plaintiffs' decedent was more than slight when compared with the negligence of defendant, there can be no recovery.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Baker, Lower & Sheehan and *Edward Shafton*, for appellants.

Kennedy, Holland & De Lacy, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

DAY, J.

This is an action for damages for wrongful death brought by the executrix and administrator of the estate of Alexander C. Troup. At the close of plaintiffs' evidence, the trial court sustained the motion of defendant to discharge the jury and enter judgment for defendant.

This unfortunate accident in which decedent met his death occurred October 23, 1929, near the intersection of Thirty-eighth and Farnam streets in the city of Omaha. It was conceded that his death was the result of the accident; that he was a judge of the district court with a salary of $5,000 per annum; that he was 75 years old, able-bodied, and in good health. The sole issue presented by the appeal is the sufficiency of the evidence as to negli-

gence of decedent and defendant to require a submission of this issue to the jury.

Mrs. Porter was driving west on Farnam street and had passed the intersection of Thirty-eighth street somewhere between 40 and 60 feet. This was a congested corner at the time of day (8:20 a. m.) this accident occurred. The decedent had come from the entrance of the Colonial Hotel, 66 feet west of the west curb of the intersection, supposedly crossing the street at that point to board an east-bound street car which was stopped on the opposite side of the street with the rear end about even with the hotel entrance. The defendant's car was proceeding close to the cars parked on the north side of Farnam street and north of the west-bound street car track. The distance from the north rail of the west-bound street car track to the curb at the place of the accident is 14.6 feet. It was the custom of many people, both from the hotel and those living west, to board the east-bound car by crossing the street west of this intersection. This custom was known to defendant. Many cars were parked on the north side of Farnam street. The plaintiffs offered in evidence admissions of defendant made in a deposition taken some time before the trial. There was no eyewitness to the accident. Even the defendant stated in her answers to questions in the deposition which was offered by plaintiffs that she did not see the decedent until he stepped about two feet in front of her car.

It was into this situation that the defendant drove her car with full knowledge of the congestion at the intersection and the custom of the people intending to board the street car to cross the street in front of the hotel some distance west of the intersection. The evidence as to speed is that of the motorman of the standing street car, that when defendant passed the front of the street car at least 40 feet east of the accident, her car was moving 25 miles an hour. In addition to this, there is testimony that the decedent when hit was hurled into the air and rolled from 18 to 40 feet. From this testimony speed might be de-

termined. Section 39-1102, Comp. St. 1929, which was the statute in force at the time of the accident, provided that "within any city or village no motor vehicle shall be operated at a rate of speed greater than is reasonable and proper, having regard of the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person." Violation of this statute, if any, would be evidence of negligence. While the judges of this court are not in entire accord upon the question, the majority is of the opinion that this evidence is sufficient to require the submission to the jury on the question of defendant's negligence unless the negligence of decedent was more than slight in comparison thereto.

It is therefore necessary to consider the negligence of the decedent for the purpose of determining whether or not it was as a matter of law more than slight when compared to the negligence of the defendant. If it was not more than slight when so compared, then the trial court should have submitted the question of comparative negligence to the jury. The evidence relating to the decedent's negligence is that introduced as the admissions of the defendant and is as follows: "He was running, as I say; he came between the parked cars, between the cars, and he was into my car,—he was into my car before I realized it, and I put my brakes on, released the clutch and put the brakes on immediately." No other witness saw the impact or saw the decedent from the time that he came out of the door until he was lying on the pavement after the accident. One witness (Palmer) testified that he had to go around a parked automobile after he heard the impact before he could see the decedent, and at the time he saw him he had not yet stopped rolling. We are of the opinion that the contributory negligence of decedent was more than slight. The decedent could not be presumed to have exercised due care for his safety, because there is direct evidence of negligence. In such a case there was no duty of making the comparison under the comparative negligence

law imposed upon the jury. *Francis v. Lincoln Traction Co.*, 106 Neb. 243; *Frye v. Omaha & C. B. Street R. Co.*, 106 Neb. 333, 22 A. L. R. 607; *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692; *Johnson v. City of Omaha*, 108 Neb. 481; *Allen v. Omaha & S. I. R. Co.*, 115 Neb. 221. It seems the evidence fairly establishes as a matter of law that the decedent herein in stepping from between two parked automobiles directly in front of the defendant's car without looking is more than slight negligence in comparison with the negligence of the defendant and that the trial court was justified in discharging the jury and entering a judgment in favor of the defendant.

AFFIRMED.

OLD LINE INSURANCE COMPANY, APPELLEE, V. ELDON STARK ET AL., APPELLEES: ELMWOOD STATE BANK, APPELLANT.

FILED FEBRUARY 13, 1934. No. 28760.

1. **Vendor and Purchaser: RECITALS IN CONVEYANCE.** The pertinent recitals in a duly recorded deed or mortgage concerning the status and capacity of the parties, and the estate conveyed or intended to be conveyed, are binding upon the grantors and notice to those subsequently dealing with the title.
2. **Mortgages: ESTOPPEL.** A mortgagee whose mortgage contains an express recital that it is subject to an existing prior mortgage is thereby, in the absence of special equities, estopped to question the validity of such prior mortgage.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Carl D. Ganz and *W. A. Robertson*, for appellant.

Dwyer & Dwyer, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

BLACKLEDGE, District Judge.

This case is presented here by the Elmwood State Bank, defendant and sole appellant. It is an action to foreclose certain mortgages, in the trial of which it developed that the title of the original mortgagor was derived from the will of Joseph Mullin which was probated in January, 1916, and contained the following provisions:

"I give and bequeath to my daughtar, Minnie B. Stark, a life lease on the following described real estate: The west half of the southwest quarter of section eight (8), range ten (10), town ten (10), in Cass county, Nebraska, together with the west thirty acres of the northwest quarter of the northwest quarter of section seventeen (17), range ten (10), town ten (10), in Cass county, Nebraska. All of this subject only to the one-half the expense of furnishing a home and maintenance for my stepmother aforesaid. The residue of the interest in the last described real estate to which my daughter Minnie B. Stark shall have a life lease I give and bequeath in fee simple to the lawful heirs of my daughter Minnie B. Stark. My desire being that my daughter Minnie B. Stark shall have a life lease to the real estate described in clause seven of this will and that her lawful heirs shall have it in fee simple without any encumbrance or lien thereon upon the death of the said Minnie B. Stark."

The district court entered a decree of foreclosure in the plaintiff's behalf and awarded to the appellant a subsequent lien upon certain interests in the real estate involved.

The appellant states in its brief that there is only one issue involved in the case, to wit, whether the mortgages asked to be foreclosed are valid liens upon the land involved, and that this issue depends upon (1) whether or not the will of Joseph Mullin by which the mortgagor, Minnie Belle Stark, derived title effectively restricted the land from being encumbered, and (2) whether or not the restriction in the will was cured by the deed given to her by her children prior to the execution of the mortgages.

For a correct understanding of the situation, the following additional facts appearing in the record should be noted. Any interest of the stepmother named in the will was eliminated by a release as to this land executed by her and she died before the institution of this suit.

Minnie Belle Stark and her husband, John Gerry Stark, after the probate and allowance of the will, entered into the possession of the premises and continued to occupy the same as their homestead until their deaths, respectively, in 1925 and 1931. They had four children, all of whom were adults at all times referred to in these transactions.

In September, 1923, these children executed a deed for the premises to their mother Minnie Belle Stark containing these recitals:

"That the said parties of the first part * * * have remised, released, and quitclaimed, and by these presents do, for themselves, their heirs, executors and administrators, remise, release, and forever quitclaim and convey unto said party of the second part, and to her heirs and assigns forever, all their right, title, interest, estate, claim and demand, both at law and in equity, of, in and to all (description).

"The grantors herein being all of the children, and the heirs of the said Minnie Belle Stark, it is their intention to hereby vest title in said Minnie Belle Stark, in fee simple, in and to the premises described above. Together with all and singular the hereditaments thereunto belonging.

"To have and to hold the above described premises unto the said Minnie Belle Stark, heirs and assigns; so that neither the said grantors, or any person in their name and behalf, shall or will hereafter claim or demand any right or title to the said premises or any part thereof, but they and every one of them shall by these presents be excluded and forever barred."

In February, 1924, Minnie Belle Stark and her husband negotiated with John H. Fowler a loan on said premises of $9,000, which was evidenced by notes of $8,500 and

$500 and a commission mortgage of $423.70, secured by separate mortgages all executed at the same time. The deed and mortgages were all properly recorded, and in the execution thereof W. N. McLenon, cashier of appellant bank, acted as witness to the instruments and as notary certifying the acknowledgments thereof. The appellant bank thus had both actual and constructive notice of the transactions.

In September, 1925, Minnie Belle Stark died intestate, leaving her husband and four children surviving. No administration was had of her estate and the occupancy continued, otherwise, as before.

In December, 1928, the husband, John Gerry Stark, and his son, Cecil, executed appellant's mortgage securing three notes in the amounts of $500, $500, and $3,050, respectively. The mortgages described the premises with the added clause, "as the respective interests of the said grantors in and to the foregoing described real estate appear" and "subject, however, to one prior mortgage."

The status of the parties and property continued unchanged, the interest on all the mortgage debts and $500 principal of appellant's debt being paid, until after the death intestate of John Gerry Stark which occurred April 18, 1931. No administration of his estate was had, and thereafter all payments were defaulted and this suit was commenced in July, 1932. The original $8,500 mortgage to Fowler is held by plaintiff herein.

Appellant contends that the will and the deed should be so construed as to hold that Minnie Belle Stark took only a life estate under the will, which estate became extinguished by her death; that she took nothing and the grantors lost nothing by the deed to her of September 1, 1923; that the restrictive terms of the will prevented any valid conveyance by the children until after her death; and that, therefore, when she died there was no estate left upon which the plaintiff's mortgage could operate, hence the lien of the appellant stepped into first place

covering the one-third interest which the husband, and the one-sixth interest which the son, owned.

A considerable part of the briefs and argument in this court is devoted to a discussion of the limitations of the will and the rules of law pertaining to vested and contingent remainders, but we will first give attention to another phase of the case.

Appellant, upon the matter of estoppel, argues that plaintiff was charged by the record with notice of the terms of the will and consequent incompleteness of the title of its mortgagor, and that, if the title turns out to be bad, it must suffer the consequences. This may be admitted, but the question of estoppel enters the case from the opposite direction.

In this case the original mortgagee, the owner of the life estate and the defendants through whom appellant claims and has derived whatever interest it has in the subject-matter recognized an incomplete title and set about to perfect it. In so doing the deed was executed. The parties knew that they at the time were the only existing persons holding vested, contingent, or potential interest in the land. With the express purpose of so disposing of their interest as to vest in their mother the fee title, they executed the deed reciting that purpose. Thereupon, the loan was made and the plaintiff's mortgage executed, and the mortgages and the deed have stood of record and unchallenged by the grantors or any one claiming through them, throughout the remaining life and death of their mother, also that of their father, and at and after the execution of appellant's mortgage, during a total period of more than seven years before even a default was made in the payment of interest, and of eight years before the question was raised. Moreover, the appellant, having both actual and constructive notice of the will, the deed, and the prior mortgages, itself accepts its mortgage asserted in this suit which does not purport to convey a definitely described interest in the premises, but recites that it conveys only such "as the respective interests of the said

grantors in and to the foregoing described real estate appear," and that even such mortgage was "subject, however, to one prior mortgage."

We agree with the statement that there is no principle of law more elementary or better founded in reason than that all persons claiming an interest in or a lien upon real estate are bound to take notice of the recitations in a duly recorded instrument in the chain of title of their grantor. We think it is applicable to the situation of the appellant in this case.

As the title stood upon the probate of the will and before the deed, the interest which would eventually become perfected in the grantors of the deed would not be, in respect to this deed, properly an after acquired interest. It had, whether vested or contingent, a present existence with potential enjoyment, destined to completion upon the death of the mother. It was more than a prospect of inheritance. It was the actual substance, with well-defined attributes. The deed was in the chain and made by, with others, the very persons through whom appellant immediately claims. It purported to establish the grantee therein as fee simple owner. Under its recitals neither the grantors therein, nor the appellant who claims through one of them and the husband of the deceased grantee, should be allowed to repudiate the fair import of the conveyance and set up a claim in hostility thereto. *Peters v. Northwestern Mutual Life Ins. Co.*, 119 Neb. 161; *Carter v. Leonard*, 65 Neb. 670; *Hagensick v. Castor*, 53 Neb. 495; *King v. Boettcher*, 96 Neb. 319; *Van Rensselaer v. Kearney*, 52 U. S. 297.

In the case of *O'Connor v. Power*, 124 Neb. 594, it is expressly held: "While the mortgagee may ordinarily assert the invalidity of a prior mortgage, when that mortgage is a valid subsisting lien between the parties, and there are no intervening equities, he is estopped to question its priority when his mortgage contains an express recital that it is given subject to the prior mortgage."

So far as concerns the appellant, the case presents an

instance of estoppel fully established and effectually preventing the appellant from asserting the invalidity of plaintiff's mortgage.

The conclusion reached on the proposition discussed renders unnecessary the consideration of the proposition pertaining to the limitation by the will of the right of conveyance, or the kind of remainder created thereby.

The judgment of the district court is

AFFIRMED.

HOLT COUNTY, APPELLEE, V. JOHN MULLEN, APPELLANT.

FILED FEBRUARY 13, 1934. No. 29041.

1. **Pleading.** Although the statutes and rules of court are liberal in reference to amendment of pleadings, the trial court must necessarily have a reasonable discretion in allowance of amendments. No abuse of such discretion appears in the instant case.
2. **Master and Servant.** Evidence examined and finding that neither emancipation of the minor son nor a direct contract of hire between him and his father had been established is approved.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

George M. Harrington, for appellant.

Deutsch & Stevens, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

BLACKLEDGE, District Judge.

In this, a case under the workmen's compensation act, the original claimant, John Mullen, a minor, who sues by his father as next friend and is defendant herein, made application to recover compensation from the county of Holt. It appears that there was a stretch of highway near the farm home of the father, Michael Mullen, in need of repair and the proper authorities of Holt county con-

tracted with Michael Mullen to furnish two men with teams and wagons to haul gravel and distribute it on the highway for the purpose of effecting such repair work. Michael Mullen owned the teams and wagons and started the work by putting his hired man on the job with one team and wagon and his son John Mullen, a minor under the age of 16, on the other wagon. In the course of the work, the team which the boy, John Mullen, drove became frightened and ran away throwing him out, and from which he suffered a skull fracture, which injury forms the basis of this suit. Michael Mullen, the father, did not carry compensation insurance and the county with whom he contracted did not require him to carry such insurance; whereby it is claimed, and not controverted herein, that because of such failure on the part of the county to require Michael Mullen to carry insurance the county became liable with him in the event a proper compensation claim should arise. Comp. St. 1929, sec. 48-116.

The questions presented as the basis of this appeal arise upon the propositions whether there was a contract of hire between the father and his minor son, and whether the son had been emancipated so that such contract could be made and established in this case. It appears to be the position of both sides to the suit that, in order for the claimant to maintain his suit against the county, he must have established both his emancipation and a direct contract of hire between himself and his father, to which purpose, and the defeat thereof, the efforts of the parties at the trial were principally applied.

Upon the threshold of the case, however, there arises this proposition. The appellant makes complaint that he was wrongly denied the privilege in the district court of amending his answer so as to allege a direct contract of hire between himself and his father instead of an implied contract which he had pleaded. The record shows that in his pleadings before the compensation commissioner the claimant alleged an implied contract. He also in the district court, in his answer which he was given leave to file

at the beginning of the trial, alleged an implied contract. It appears that, at the conclusion of the trial after the evidence was all in, the claimant asked leave to so amend his answer as to change his allegation from that of an implied contract with the father to a direct contract, which request was denied by the trial court. Complaint is here made of that ruling. The application to amend appears at the close of the bill of exceptions, and the final ruling thereon by the district court is:

"I have been quite liberal in the matter of allowing amendments to pleadings, both as to substance and as to time; in fact, too liberal. This case was tried; the evidence was taken and submitted, except the matter of the bank account of the young man at Emmett. No such motion as this was presented before or during the trial and it will be disallowed."

The appellant bases his contention here upon abuse of discretion by the district court in refusing to permit the amendment. Upon the record we cannot so hold. It is true that our statutes, and rules of the court as well, are liberal in matters of amendment of pleadings, but the trial court has and must necessarily have a reasonable discretion in such matters. It appears that, not only having pleaded an implied contract before the commissioner and repleaded the same in his amended answer which was allowed immediately prior to the trial, the court had been reasonably liberal, and that the character of the proposed amendment was such as to materially change the basis of the defendant's suit and claim, so that we cannot say that there was an abuse of discretion by the trial court in refusing, after the trial was over, to allow such an amendment.

This then leaves the case in the situation that the allegations of the defendant's answer do not agree with his proofs and he does not plead the sort of contract which, it seems to be conceded by both parties, is necessary to support his claim.

Assuming, however, that the proposed amendment may

have been allowable, we then proceed to an examination of the question whether the minor son, claimant, had been emancipated so that he could contract with his father in the present instance, and whether there was a direct contract of hire between the father and the son under which the son was working at this time so as to bring him within the provisions of the compensation law. Upon this question we have reviewed the evidence as contained in the bill of exceptions in detail. To set the same out herein would unnecessarily extend the length of this opinion. It must suffice to say that our conclusion is that the district court was right in its finding upon both of said propositions, and that the evidence herein is not sufficient to support a finding either that the claimant had been emancipated or that there was a direct contract of hire between him and his father. In reference to a similar matter, there is language in the opinion in the case of *Aetna Life Ins. Co. v. Industrial Accident Commission*, 175 Cal. 91, quite applicable to the present situation, from which we quote:

"Nor, finally, does the fact that the father from time to time gave the son small sums of money, even though both father and son should testify that these sums were on account of payment of wages, at all militate against the incontrovertible fact that the son had not been emancipated. A son nineteen years of age was surely entitled to some spending money, and as his earnings belonged wholly to his father, it would be strange indeed if his father did not give him such sums for his own purposes. Many fathers are called upon to do the same thing, and many, to encourage their sons to form habits of industry and frugality, and 'to learn the value of money,' make these donations dependent to a greater or less extent upon the conduct and services of the child. But such payments in no sense work an emancipation of the child himself."

It follows that the judgment of the district court should be and is

AFFIRMED.

LOLLA PERRY, ADMINISTRATRIX, APPELLANT AND CROSS-APPELLEE, V. IRA E. NEEL ET AL., APPELLEES AND CROSS-APPELLEES: L. H. CHENEY, ADMINISTRATOR, CROSS-APPELLANT.

FILED FEBRUARY 13, 1934. No. 28628.

1. **Witnesses: COMPETENCY.** Failure to make proper objection to the testimony of a witness known to be disqualified under section 20-1202, Comp. St. 1929, waives the right to exclude his testimony.
2. **Liens.** An equitable lien will not arise in favor of one who loans or advances money to another to pay the purchase price of real estate, in the absence of any agreement to give a lien.
3. **Fraudulent Conveyances.** In an action to set aside transfers of property, made during the marriage relation, by a husband to a son, which transfers are alleged to have been made for the purpose of fraudulently depriving the wife of her marital rights under the law of descent, the burden is upon the plaintiff to establish by a preponderance of the evidence that the husband was actuated by bad motives and fraudulent intent to deprive the wife of her marital rights, and that the entire transaction was a mere device by which he sought to defraud her.

APPEAL from the district court for Red Willow county: CHARLES E. ELDRED, JUDGE. *Affirmed in part, and reversed in part, and remanded, with directions.*

Butler & James and *Perry, Van Pelt & Marti,* for appellant.

L. H. Cheney, for cross-appellant.

Cordeal, Colfer & Russell, contra.

Heard before GOOD AND EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

RAPER, District Judge.

This action was brought by plaintiff, Lolla Perry, as administratrix of the estate of Eliza Neel, to subject to the payment of a judgment for alimony rendered in favor of Eliza Neel against John R. Neel two tracts of land, one

of them being near the village of Bartley, a farm of 90 acres, which will be designated as the Bartley property; the other a farm of 232 acres near the town of Red Willow, and will be designated as the Red Willow property, both tracts being in Red Willow county.

In the first cause of action in her petition, plaintiff alleges that she is the duly qualified and acting administratrix with the will annexed of the estate of Eliza Neel; that, since this action was begun, John R. Neel died and said action was revived in the name of L. H. Cheney as his administrator; that on April 13, 1929, in the district court for Lancaster county, Nebraska, Eliza Neel recovered a judgment against John R. Neel in the sum of $4,000 as permanent alimony; that said judgment was revived in the name of plaintiff on the 20th day of June, 1930; that a transcript of said judgment was duly filed in the office of the clerk of the district court for Red Willow county on the 26th day of June, 1930; that execution was issued on said judgment which execution was returned unsatisfied on November 16, 1930, by the sheriff; and that said judgment is in full force and unpaid.

Plaintiff further alleges that, prior to October 20, 1924, the defendant John R. Neel was the sole owner (except the homestead right of Eliza Neel) of a property known as the "hospital property" in the village of Holbrook, Nebraska, and, on October 20, 1924, John R. Neel exchanged the "hospital property" for the 90-acre tract of land known as the Bartley property, and that, without the knowledge of Eliza Neel and without any consideration, John R. Neel caused said property to be conveyed to Ira E. Neel, and that said conveyance was made with the intent to hinder, delay, and defraud Eliza Neel in obtaining her marital rights; that, in fact, Ira E. Neel is not the owner of said land but only holds title thereto as trustee for John R. Neel.

The second cause of action alleges that, on January 1, 1921, John R. Neel was the owner of 232 acres of land designated as the Red Willow land; that this land was

conveyed to Ira E. Neel by John R. Neel and Eliza Neel, without consideration except two notes for $13,000 and $6,000, respectively, secured by real estate mortgages, and that these notes were dated February 21, 1921, one of which mortgages covered the Red Willow land and the other mortgage covering other land; that Eliza Neel, when she joined in said conveyance, was unaware of the fact that said conveyance was for the purpose of fraudulently converting said real estate into personal property, and that she joined in the conveyance only on the representation of Ira E. Neel that the notes and mortgages would remain in full force until they were paid; that thereafter, unknown to Eliza Neel, Ira E. Neel secured from John R. Neel releases of the said two mortgages; that said releases were without any consideration, and that, on or about December 29, 1921, defendants Ira E. Neel and W. Frank Neel, in order to deprive Eliza Neel of her distributive share under the law of descent, induced John R. Neel to cancel the mortgages of $19,000 under the agreement of Ira E. Neel and W. Frank Neel to pay interest only on the principal; that the consideration for the canceling of the indebtedness and releasing of the mortgages was inadequate and unconscionable and amounted to a fraud upon Eliza Neel and was done for the purpose of depriving Eliza Neel of her marital rights, and to evade the law of descent; that Eliza Neel was not a party to said transaction, had no knowledge thereof, did not assent thereto, but was led to believe that her marital rights had been protected. She prays that, as to the "Bartley property," Ira E. Neel be adjudged to hold it in trust for John R. Neel, and that the releases of the mortgages on the "Red Willow property" be canceled and set aside and Ira E. Neel adjudged to hold the property in trust for John R. Neel and required to account for all rents received while in possession of said properties, and that same be offset against any claim of Ira E. Neel against John R. Neel.

The answer to the first cause of action admits the judgment for alimony, the filing of the transcript and the issuance and return of execution thereon, and admits that, on October 20, 1924, John R. Neel held the record title to the Holbrook property, and that on said date he exchanged it for the Bartley property; and denies other allegations of the petition. Then, as to first cause of action, the answer alleges that, prior to September 16, 1910, one Penelope Neel owned certain property in Indianola, and that on that date she died intestate leaving as her only heirs John R. Neel, her husband, and Ira E. Neel and W. Frank Neel; that, on December 29, 1915, John R., Ira E., and W. Frank Neel joined in a conveyance of the Indianola property for the Holbrook property, title to which was taken in the name of John R. Neel, who was in fact owner only of an undivided one-third interest, Ira E. and W. Frank owning the remaining two-thirds; that, on October 20, 1924, John R. Neel, on behalf of himself and Ira E. and W. Frank Neel, exchanged the Holbrook property for the Bartley land, the consideration expressed in the exchange contract for the Holbrook property was $6,000, and for the Bartley land $9,000; and that Ira E. Neel furnished the money with which the difference, $3,000, was paid; that the deed for the Bartley property was duly filed for record in the office of the county clerk of Red Willow county on April 4, 1925, and became and ever since has been notice to Eliza Neel of the rights of Ira E. Neel therein; that, at the institution of this suit, more than 5 years had elapsed since the filing of said deed, and any right of action Eliza Neel had was barred by the statute of limitations.

The answer to the second cause of action alleges that, on January 1, 1921, John R. Neel was the owner of the Red Willow land; that the land did not yield sufficient income to properly maintain him and Eliza Neel; that, being indebted to Ira E. Neel in the sum of $1,000, he proposed that he and Eliza Neel should execute deed to Ira and the latter to execute mortgages aggregating $19,-

000, bearing interest at 6 per cent.; that, as a result of this suggestion, John R. Neel and Eliza Neel deeded the Red Willow property to Ira E. Neel for the expressed consideration of $20,000, and Ira E. Neel executed to John R. Neel the two mortgages for $13,000 and $6,000; that, on December 29, 1921, in consideration of the release of the two mortgages, John R. Neel and Ira E. and W. Frank Neel entered into a contract whereby W. Frank Neel and Ira E. Neel each agreed to pay to John R. Neel the sum of $50 a month as long as he lived; that, in consideration of the agreement made by W. Frank Neel, Ira E. Neel conveyed to W. Frank Neel certain real estate; that John R. Neel than executed releases of the two mortgages which were recorded in the office of the county clerk of Red Willow county, and these releases have ever since been notice to Eliza Neel, and that at the institution of this suit more than 10 years had elapsed, and that any right of action Eliza Neel had was barred by the statute of limitations. The answer does not ask for affirmative relief, but prays that plaintiff's action be dismissed.

Plaintiff for reply denies the allegations of the answer, except admissions, and alleges that, at the time of the marriage of John R. Neel and Eliza Neel, John R. Neel owned the Red Willow land of the then value of $20,000, and other real estate and personal property of the value of $6,000; that John R. Neel had a homestead interest in the Indianola property, and the value of the property did not exceed $2,000; that Ira E. and W. Frank Neel released and conveyed all their rights to said property, and any cause of action which Ira E. and W. Frank Neel had therein was barred by the statute of limitations prior to the sale of the Holbrook property; that Ira E. Neel is estopped from claiming that the value of the Holbrook property was less than $6,000; that the title to the Bartley land was placed in the name of Ira E. Neel was concealed from Eliza Neel; that, at the time the Bartley land was acquired, Ira E. Neel held title to the Red Willow

land but had paid no part of the consideration except $1,000, and alleges that any sum claimed to have been advanced to John R. Neel should be applied on indebtedness owing by Ira E. Neel to John R. Neel.

L. H. Cheney, the administrator of the estate of John R. Neel, filed an answer and reply in which he substantially incorporates the contentions of plaintiff, and prays the court to decree that the lands belonged to John R. Neel at his death.

The trial court found that, at the commencement of the action, John R. Neel was the owner of the "Bartley property," subject to an equitable lien in favor of Ira E. Neel in the nature of a mortgage for money advanced on purchase price, and interest thereon, and for the payment of a mortgage of $1,000 and interest, and for taxes paid $335.93, amounting in the aggregate to $5,036.56; that Ira E. Neel be charged with the rents from 1928 to 1931, at $225 a year, which with interest to date of decree was $630.74, leaving a balance due Ira E. Neel of $4,405.82. The court dismissed plaintiff's second cause of action.

At the outset, in considering the evidence, we are met with the competency of much of the testimony. The trial judge overruled all the objections and apparently admitted all that either side offered, with the statement that he would consider only what was competent, but he has not given any indication in his findings as to what, if any, he rejected.

The first one of these questions relates to the offered testimony given by John R. Neel at the trial of the divorce action. Objection was made that it was immaterial because it was taken in an action in which the defendants in this action were not parties. This objection is not sufficient to exclude that testimony. Transcript of the testimony of Eliza Neel given in the divorce action was received without objection. The testimony of Lolla Perry and Ada Burton is in depositions, and it is not certain whether the objections to parts of their evidence were made at the time of the trial or at the time the deposi-

tions were taken. If the objections as to their competency under section 20-1202, Comp. St. 1929, were first made at the trial, the objections were unavailing. If made at time depositions were taken, their testimony was inadmissible in part. There are very few statements in Lolla Perry's deposition as to conversation with John R. Neel that are material. The appellant claims that, inasmuch as Ada Burton is the sole beneficiary under her mother's will, Lolla Perry, as executrix, is not barred from testifying as to conversations with John R. Neel, but it will be unnecessary to determine that. As to Ada Burton's testimony, appellees in their brief claim that her testimony was improperly received. This would be true if proper objection had been made, but only in a few instances were such objections interposed.

Ira E. Neel's testimony was objected to under section 20-1202, Comp. St. 1929, but, as many of the matters covered in his testimony had been offered by plaintiff, much of his evidence was admissible. *Kroncke v. Madsen*, 56 Neb. 609; *Bangs v. Gray*, 60 Neb. 457; *Dickenson v. Columbus State Bank*, 71 Neb. 260.

L. H. Cheney, the administrator of the estate of John R. Neel, objected to the testimony of Ira E. Neel. John R. Neel was made a party defendant but died after the case was begun. It is not disclosed whether he was served with a summons before his death. Cheney, administrator, filed an answer to plaintiff's petition, alleging in substance the same cause of action as that of plaintiff. John R. Neel was not a necessary party, and it is doubtful if his administrator is. Cheney did not object to the testimony offered by plaintiff as to the transactions between John R. Neel and his son Ira, and he is not in position to object to Ira testifying to those transactions that were offered by plaintiff.

The testimony discloses that Eliza Neel and John R. Neel were married July 21, 1915. Both had been previously married, and both had adult children by their previous marriage. They separated in 1927, and on April 13,

1929, in the district court for Lancaster county, Eliza Neel was granted a divorce and awarded a judgment for $4,000 permanent alimony. Eliza Neel died testate in December, 1929, and on January 31, 1930, Lolla Perry was appointed and qualified as administratrix with the will annexed, and on June 26, 1930, transcript of said judgment was duly filed in the office of the clerk of the district court for Red Willow county, upon which an execution was issued and duly returned unsatisfied. At the time of the marriage, John R. Neel owned a one-third interest in a property in Indianola, and a homestead right, the other two-thirds being owned by Ira E. Neel and W. Frank Neel, who were the only children of John R. This property was worth about $1,800. John R. Neel also owned in his own right three other lots in Indianola, and a farm of 232 acres near the town of Red Willow, which is referred to as the Red Willow property. All these properties were unencumbered. He also owned 16 shares of bank stock. On the 28th of December, 1915, John R. Neel traded all the Indianola lots to Jacob Thompson for two lots in Holbrook, known as the "hospital property." Eliza Neel, Ira E. Neel and his wife, and W. Frank Neel and his wife joined with John R. Neel in the conveyance to Thompson. The deed to the Holbrook property was made to John R. Neel. John R. Neel and his wife Eliza then moved to and lived in the Holbrook property until the year 1924, when John R. Neel and his wife Eliza deeded the Holbrook property to one James Carroll in exchange for a 90-acre farm near Bartley, which is designated as the Bartley property. By direction of John R. Neel, the deed from Carroll to the Bartley land was made to Ira E. Neel. There is doubt as to the admissibility of some of the evidence of Ira E. Neel as to how the consideration in part was paid for this exchange. The value of the Holbrook property in the exchange agreement was fixed at $6,000, and the value of the Bartley land at $9,000. Appellant in her brief, however, concedes that Ira paid $3,000 to his father to pay the difference. She

claims, and the record shows, that Ira did not know the Bartley land was deeded to him until after the whole deal was closed. Ira now claims, and the trial court found, that Ira has an equitable lien on the land for the $3,000 and interest, less the rentals received. Ira, in his answer, does not claim a lien nor does he assert title, but insists that by implication he is entitled to the lien. In the testimony of John R. Neel, at the divorce hearing (and which was offered by plaintiff herein), he testified that he owned no property. Nowhere in the record is there any evidence that there was any agreement or understanding that Ira was to have a lien on the land for the money he advanced to his father to pay the $3,000 difference in the value of the two properties. Without some such agreement no such lien can attach. The mere fact that one loans money to another, wherewith to buy land, gives the lender no equity in the land bought therewith by the borrower. *Fike v. Ott*, 76 Neb. 439; *Boring v. Dodd*, 116 Neb. 366. In this latter case, this rule is given:

"Where there is no contract out of which a lien can grow, nor any duty of one party to give to another a charge or lien on real estate, no basis for such lien exists."

It is no more consistent with the facts in this case that by placing the title in Ira's name the father intended to give only the legal title, and this is further evidenced by Ira's claim that he paid the rentals to his father for several years. The fact that the deed was made to Ira was concealed from the wife, and, in view of the occurrences which will be later referred to about the 232-acre farm, and John R. Neel's denial at the divorce trial that he owned any property, we hold that the placing of the deed in Ira's name does not give him an equitable lien for money advanced or loaned to his father.

Ira claims that he was a part owner of the two homestead lots in Indianola, which were part of the lots traded for the Holbrook property. He joined in the deed, and from that time there seems to have been no attention paid to any share of the two homestead lots, and the value

of his one-third interest, subject to his father's life estate, would be very small, and it is properly inferable that, when the father took title to the Holbrook property, Ira relinquished whatever right he might have had in the Indianola homestead, and there is no evidence from which his share therein can be valued, so that claim cannot be asserted as giving rise to a lien on or title to the Bartley 90 acres. Furthermore, the fact that Frank does not claim any interest indicates that both Frank and Ira relinquished their small interest.

However, plaintiff in her brief, while insisting that there is no competent evidence that Ira loaned or advanced to his father $3,000 to pay the difference in the exchange, concedes that Ira helped his father in that transaction to the extent of $3,000, and is willing to have decree entered that John R. Neel owns two-thirds and Ira E. Neel one-third of the Bartley land, that being the proportionate share of the consideration paid by them. This is equitable and, under the evidence, it is all that Ira can justly claim. It is well known that land values have greatly depreciated since 1925, and to give Ira a lien with interest would in all probability result in plaintiff receiving nothing under the trial court's decree.

Ira testified that he paid his father the rent for the years 1925, 1926, and 1927, which plaintiff insists was incompetent evidence and is in fact inadmissible.

Several witnesses testified as to the rental value of the Bartley land for the years 1925 to 1931, inclusive. The lowest estimate by any witness other than Ira was $270 per annum and their estimates ranged from that to $360 per annum. According to Ira's testimony he received rentals in the aggregate sum of $794.19, an average of less than $200 for the years 1927 to 1931. The trial court fixed the annual rental at $225 per annum, but by a fair preponderance of the evidence it should be fixed at $300 per annum. These amounts for the years 1925 to 1931, inclusive, should draw interest at 7 per cent. from the 1st day of March following each succeeding

rental year. The appellant concedes that Ira should receive credit for the taxes paid, in the aggregate sum of $335.98, and interest at 7 per cent. from the date of each year's payment, which we therefore conclude should be allowed; but, as Ira holds title to one-third of the land, he of course will be entitled to one-third of the rents and liable for one-third of the taxes, so when the computations are made, as above directed, two-thirds only should be charged against Ira's share in the land.

The testimony concerning the 232-acre farm called the Red Willow property is that, on February 21, 1921, John R. Neel and wife Eliza conveyed this land to his son Ira for an expressed consideration of $20,000, and Ira gave his father two mortgages for purchase price, one of the mortgages was for $13,000 on the Red Willow land, and $6,000 mortgage on some other land owned by Ira. These mortgages bore interest at the rate of 6 per cent. per annum and matured in 10 years. John R. Neel executed releases of these mortgages December 29, 1921, and the releases were then duly recorded in the office of the county clerk. It is difficult to determine in some of Ira's evidence whether he was competent to testify as to particular parts. However, upon the circumstances attending the releasing of these mortgages, the plaintiff offered statements of John R. Neel that he received after the date of the releases the same amount from his sons as the interest on the mortgages, by which the inference is to be drawn that there was no consideration for the releases, it seems that Ira might testify as to the facts concerning such consideration. There was received in evidence a written contract signed by John R. Neel and his two sons, Ira and Frank, dated December 29, 1921, in which it is agreed that, in consideration of the releases of the two mortgages, Ira and Frank bound themselves to pay to their father the sum of $100 a month so long as he lived. Ira testified that he and his brother each paid $50 a month to their father during his life as the contract provided. It further appears that Ira deeded to Frank some

land as a consideration for Frank joining in this contract. There is no evidence in the record to indicate that John R. Neel ever had possession of the 232-acre farm after it was conveyed to Ira, nor that he paid taxes thereon or claimed any right or title to it, so that it definitely appears that the land was actually conveyed to Ira without any restrictions in favor of the grantors. In Ira's answer he alleges that, at the time of such conveyance, the land was not worth more than $10,000. It is a suspicious circumstance that Ira would purchase the land for $20,000, and, after deducting $1,000 that his father owed him, give mortgages for $19,000 to secure the balance of the purchase price, if the transfer was made as a *bona fide* sale. The father was at that time about 73 years of age, and, considering the probable duration of his life, the arrangement to release the mortgages was a very profitable one for Ira. Later, and in 1925, the placing of the title to the Bartley land in Ira's name, without a satisfactory reason why that was done, is another circumstance which points toward a plan to get the property out of the ownership of John R. Neel. The releasing of the mortgages was concealed from Eliza. She supposed the conveyance of land and the giving of the mortgages was a *bona fide* transaction. Ada Burton, her daughter, testified that Ira in her presence told her mother long after the date of the releases that he was paying the interest and would pay the principal as needed. Ira denies that statement. At the time of the releasing of the mortgages, the domestic relations between John R. and Eliza were pleasant. Trouble did not arise until about 1926 or 1927, which trouble culminated in a separation in this latter year. In 1921 John R. Neel owned the Holbrook property and some bank stock, besides the 232-acre Red Willow land. What became of the bank stock is in doubt. John R. Neel's testimony states that he gave that to Ira to pay a debt he owed Ira. With the property situation in this condition, and under the circumstances disclosed by the evidence, the proposition to be determined is whether the

transfer of the 232-acre farm to Ira and the subsequent release of the mortgages were made for the fraudulent purpose of depriving Eliza Neel of her marital rights. It seems, as above stated, that the conveyance to Ira and his giving of the mortgages were actual and *bona fide* transactions. The only thing that throws doubt on it is the statement in the answer that the property was then worth only $10,000. This in itself is not sufficient to impeach the sale. As to the fraudulent character of the releases of the mortgages, there is more doubt. The burden was upon the plaintiff to prove that the transaction was only colorable and was made for the purpose of depriving the wife of her marital rights. *Krull v. Arman,* 110 Neb. 70; *In re Estate of Sides,* 119 Neb. 314, 323. There is nothing directly indicating that John R. Neel at that time had any ill feeling towards his wife, and it may fairly be inferable from the evidence that Mr. Neel, with a proper fatherly regard toward Ira, felt that the payment of the $100 a month allowance would be satisfactory to him, and at the same time be a means of relieving Ira from a burdensome debt, and consented to and did release the mortgages without having in his mind the desire to injure his wife's expectations to inherit the property. Fraud is not to be presumed, but must be proved. Of course, it can be proved by circumstantial evidence, but the circumstances here do not appear sufficient to overthrow the transaction. There was a consideration for the releases, and, while the consideration appears to be less than the value of the mortgages, it was such as to satisfy Mr. Neel. He might be willing in entire good faith to accord to his son a better bargain than to a stranger.

There is considerable conflict in the decisions of several of the states as to the effect of transfer of property by a husband which operates to diminish the distributive share which a wife would otherwise have in his estate. There were but two cases in our state cited in the briefs which seem to have a bearing on that principle, and, in

the case of *In re Estate of Sides*, 119 Neb. 314, Judge Stewart states in the opinion, if the transfer of personal property by a husband during his lifetime is a mere device and means whereby he retains the use and benefit of the property during his lifetime and at his death seeks to deprive the widow of her distributive share, it is to be regarded as fraudulent as to the wife, and he cites the case of *Allen v. Henggeler*, 32 Fed. (2d) 69. In that case, Judge McDermott, in construing the Nebraska statute, gives the rule that the surviving widow must establish by a preponderance of the evidence that, in making gifts to his children, the father was actuated by bad motive and fraudulent intent and that the entire transaction was a mere device by which he sought to defraud her. The other Nebraska case is *Stansberry v. Stansberry*, 102 Neb. 489. Judge Cornish states the rule rather more broadly, but says: "The courts, however, as bearing upon the question of fraud (as to a transfer of real estate without consideration), take into consideration the fact that the conveyance is made to one's own children by a former marriage, or to other members of the family. Was the conveyance one which the person, under the circumstances, could and would make without intending to do or doing his wife a wrong?" These cases are not directly in point because in those cases the widow was seeking to set aside the transfers. Here plaintiff is asking to set aside the transaction to satisfy a judgment, but those cases are applicable because at the time of the transaction parties were sustaining the marital relation, and unless the fraudulent intent to deprive the wife of her rights existed at that time, the subsequent divorce does not change their respective rights.

Guided by those principles, we hold that transfer of the 232-acre farm near the Red Willow station, and the subsequent release of the mortgages, are valid as against plaintiff's claim, and the decree of the district court dismissing plaintiff's second cause of action is affirmed. As to the first cause of action, the decree of the district court

is reversed and the cause is remanded, with directions to enter decree on the first cause of action, adjudging that two-thirds of the 90-acre farm is the property of John R. Neel and the other one-third the property of Ira E. Neel, but that the share of Ira be charged with the rentals as above found and fixed, less taxes paid, and that the share of John R. Neel be sold to satisfy plaintiff's judgment.

AFFIRMED IN PART, AND REVERSED IN PART.

WESTERN PUBLIC SERVICE COMPANY, APPELLEE, V. WHEELER COUNTY: SCHOOL DISTRICT NO. 33, APPELLANT.

FILED FEBRUARY 13, 1934. No. 28660.

1. **Taxation**: VOID TAXES: RECOVERY. An owner of real estate may maintain appropriate action to recover illegal or void taxes paid by him, and it is immaterial whether they were levied while he was owner or prior thereto.
2. ———: ———: ———: PETITION. A petition in an action at law which sets forth that a tax is illegal and void for the reason that it was made without authority on the part of the officer making the same, without notice, and in a year which was not the regular year for the assessment of real estate, and that proper demand for refund was made, states a cause of action under subdivision 2, sec. 77-1923, Comp. St. 1929.
3. ———: ASSESSMENT. Under the law as it existed during the period covered by this action, real estate was assessable as of April 1, 1926, and every four years thereafter.
4. ———: ———. Except in cases where real estate becomes subject to assessment or where improvements have been added of a value in excess of $100, a precinct assessor is without power to make a return of assessment on real estate at any time other than the regular year for assessment of real estate.
5. ———: ———. The county board of equalization alone, but only on notice, may in proper cases in a year other than the regular year for the assessment of real estate equalize the value of individual parcels of real estate.
6. **Judgment.** In a case where a former adjudication is pleaded, the party so pleading assumes the burden of proving such former adjudication.

7. Taxation: VOLUNTARY PAYMENT. Where by requirement of statute a tax must be paid as a condition precedent to the bringing of action and recovery thereunder, payment under such conditions cannot be considered as voluntary.

APPEAL from the district court for Wheeler county: RALPH R. HORTH, JUDGE. *Affirmed.*

F. J. H. Lawson and *A. L. Bishop,* for appellant.

Clarence A. Davis and *Wilber S. Aten, contra.*

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

YEAGER, District Judge.

This is an action at law instituted by Western Public Service Company of Maryland, plaintiff, appellee herein, against School District No. 33 of Wheeler county, Nebraska, defendant, appellant herein. The record discloses that the plaintiff filed a petition wherein it alleged that in 1926 and up to some time in February, 1927, one Enoch Hallner was the owner of a certain five-acre tract of land within the boundaries of School District No. 33 in Wheeler county, Nebraska; that while the tract of land was owned by Enoch Hallner and in the year 1926 it was assessed for taxation at a valuation of $100; that in February, 1927, the said land was conveyed to the Nebraska Electric Power Company; that during the year 1927 the precinct assessor, or some other person, increased the value of said land, without any notice to the Nebraska Electric Power Company, arbitrarily, without authority of law and contrary to the statutes, from $100 to $18,000; that in June, 1929, the Nebraska Electric Power Company conveyed the said premises to the appellee and also conveyed to the appellee all of its personal and chattel property, choses in action, rights, titles, interests and all other property, both real and personal, and all rights attached and appertaining thereto, by a bill of sale; that such increased assessment is of record on the rolls of Wheeler

county, Nebraska, for the years 1927, 1928, and 1929, and that taxes for said years were levied thereon; that the appellee on October 7, 1929, paid the taxes based upon the $18,000 valuation for the years 1927 and 1928, and on the same date filed a written demand for a return of said taxes with the county treasurer of Wheeler county, and on November 6, 1929, a supplemental written demand was filed with the said treasurer and the treasurer of School District Number 33; that on August 9, 1930, the appellee paid the taxes based on the valuation of $18,000 for the year 1929 and on said date filed a written demand with the county treasurer and school district treasurer for a return of the same. The prayer was for the return of $1,404.46 taxes claimed to have been unlawfully and illegally collected for the years 1927, 1928, and 1929. The defendant School District No. 33, appellant herein, demurred generally, and on the further ground that there was a defect of parties in that the state of Nebraska was not made a party defendant. The demurrer was overruled and the appellant filed an answer in which the appellant reserved to itself all of the rights presented by its general and special demurrer.

In the answer, after generally denying the material allegations of the petition, the appellant alleges that the assessments complained of were adjudged to be legal in a certain action in the district court for Wheeler county, Nebraska, wherein Nebraska Electric Power Company was plaintiff and the county of Wheeler and T. E. Wyman, county treasurer, were defendants, and that the question of said assessments is *res judicata,* and that appellee is estopped from seeking a refund of the taxes for said years by reason of said adjudication and by the laches and waivers of its grantor, Nebraska Electric Power Company; that the appellee bought the said property clouded by the taxes for the years in question and is bound thereby; that the bill of sale set forth did not transfer or convey to the appellee the right to claim a return of taxes voluntarily paid by it after the said bill

of sale was executed. It further says that great improvements were added to the said real estate between April 1, 1929, and July 1, 1929, and that such improvements were subject to taxation; and that the appellee had notice of the said assessed valuation at the time of purchase and had actual or constructive notice of the findings of the suit by the Nebraska Electric Power Company to enjoin the collection of the said taxes. It further alleges that appellee has a remedy against its grantor, Nebraska Electric Power Company, under the covenant in the deed of conveyance to the appellee.

On the issues presented by the pleadings, a trial was had to the court without a jury, and judgment was rendered in favor of the plaintiff and against the defendants. The defendant, School District No. 33, alone has appealed. Two series of errors are assigned in appellant's brief as grounds for reversal of the judgment of the district court.

Appellant contends in the first of its second series of assigned errors that the demurrer to the petition should have been sustained. It is insisted, first, that the cause of action did not accrue prior to the time it is alleged to have been assigned to the appellee herein, and could not thereafter ripen into a maintainable cause of action; and, second, that no action was pleaded agreeable to subdivision 2, of sec. 77-1923, Comp. St. 1929, commonly referred to as the "Refund Law."

We cannot find ourselves in agreement with either of the propositions urged. In the case of *Haarmann Vinegar & Pickle Co. v. Douglas County,* 122 Neb. 643, Cynthia M. Daniel, the real plaintiff, was permitted to recover taxes paid, based upon assessments made when the title to the real estate in question was held by her predecessors. In that case it was substantially held that an appropriate action for the recovery of illegal or void taxes may be maintained by the owner, whether the same were assessed during his ownership or prior thereto, and thus cause to be removed the cloud from the title.

As to the second proposition, the section of the statute

referred to is in part as follows: "If such person claim the tax or any part thereof to be invalid for the reason that it was levied or assessed for an illegal or unauthorized purpose, or for any other reason except as hereinbefore set forth," etc. The remaining portion is not important for present purposes. The appellee contends that the assessment was invalid for the reason that it was made without any authority of law. An examination of the foregoing quotation, together with an examination of the entire section, indicates that the conclusion of the pleader was entirely agreeable to the relief contemplated by the statutory provisions referred to.

The only remaining question in this connection is as to whether or not the precinct assessor had power to increase the assessment of real estate in 1927, as it is alleged he did. A determination of this question, if favorable to the appellee, is determinative of all other questions raised in this action, as well as the demurrer, except the question of former adjudication.

We take judicial notice of the fact that the year 1926, being the year in which the real estate in question was valued at $100, was the regular year for the assessment of real estate, and under the statutes such valuation continued for a period of four years, unless changed on review by action of the county board of equalization on notice to the owner of the real estate. Comp. St. 1929, secs. 77-1601, 77-1702. The only power of the assessor in 1927, the year in which the new valuation was placed on the real estate involved here, was to make return of real property that shall have become subject to taxation, and of all improvements placed on real property exceeding in value $100. Comp. St. 1929, sec. 77-1605. No claim is made either that the real estate in question was not assessed in 1926 or that improvements were placed thereon before April 1, 1927. It is not suggested that any improvements were placed on the real estate until after April 1, 1929, which, of course, is immaterial, since real estate is assessable as of April 1 of any given year.

It therefore follows that the increased assessment was made by the precinct assessor without authority of law, and the judgment of the district court was right, unless the appellee is prevented from recovering because of a former adjudication upon all or a part of the subject-matter of this action.

The Nebraska Electric Power Company instituted an action in equity to enjoin the collection of a part of the taxes in question. A demurrer to the petition in that case was sustained and no appeal was taken. It is contended that this amounts to an adjudication upon the issues involved in this case. The record in this case does not disclose what was intended to be the purport of the ruling on the demurrer in that case. In so far as the record shows, it may have been intended as a decision on the merits, or only that the petition did not state a cause of action. The burden was on the appellant, having pleaded a former adjudication, to prove that the subject-matter of this action was adjudicated in another action. It has failed in this regard to sustain the required burden.

Appellant contends that the taxes paid by the appellee were paid voluntarily and therefore cannot be recovered back. It is sufficient to say that, where by statute taxes must be paid as a condition precedent to a right of action and consequent remedy, such payment may not be considered as voluntary.

For the reasons herein stated, the judgment of the district court is

AFFIRMED.

JOHN HAVENS V. STATE OF NEBRASKA.

FILED FEBRUARY 13, 1934. No. 28786.

1. **Criminal Law: NEW TRIAL.** The district court has no jurisdiction to grant a new trial in a criminal case on the ground of newly discovered evidence at a term subsequent to the one at which the verdict was rendered.
2. ———: ———. Where one has been convicted of a criminal offense and new evidence is discovered after the term at which

the verdict was rendered, such evidence may not be considered by the court.

3. **Rape: EVIDENCE: CORROBORATION.** In a prosecution for rape, there must be corroboration in some material respect, but corroboration as to the identity of the person is unnecessary.

ERROR to the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

John E. Lowe, for plaintiff in error.

Paul F. Good, Attorney General, and *William H. Wright, contra.*

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

YEAGER, District Judge.

This is a criminal action, wherein it is charged that John Havens, the defendant, plaintiff in error here, on or about the 1st day of April, 1932, committed the crime of rape upon Blanche Havens, his daughter, then a minor of the age of 13 years. The case was tried to a jury and on October 17, 1932, the jury returned a verdict finding him guilty as charged in the information. A motion for new trial was duly and regularly filed. On December 16, 1932, the motion for new trial was overruled and on the same day the defendant was sentenced to serve a term of ten years in the state penitentiary. Thereafter, on the 12th day of April, 1933, and during the March term of the district court, the defendant filed a second motion for new trial grounding the same on newly discovered evidence. The motion was supported by affidavits. Thereafter the state filed counter affidavits relating to the second motion for a new trial. On June 10, 1933, the court overruled the second motion. The affidavits were by order of this court made a part of the record in this case.

In his brief the plaintiff in error has set forth 24 separate assignments of error. We have examined them all and have concluded that only two propositions require consideration or discussion here.

The motion for new trial on the ground of newly discovered evidence was filed almost six months after the verdict was returned and nearly four months after judgment and sentence. This particular length of time is of no consequence except in the sense that it shows that the motion was filed out of the time allowed for the filing of motions for new trial in criminal cases.

This court is definitely committed to the proposition that the district court has no jurisdiction to grant a new trial in a criminal case on the ground of newly discovered evidence at a term subsequent to the one at which the verdict was rendered. A late decision on this question is found in *Simmons v. State,* 111 Neb. 644.

In the light of this existing rule of law, it has not been necessary to examine into the merits of the motion and its supporting affidavits. If the matters therein contained merit consideration, then the only tribunal empowered to examine into them is the board of pardons and paroles.

The defendant complains of a failure of the corroboration of the prosecutrix required by law, and of instruction No. 5 given in this connection. His position does not appear tenable.

The prosecutrix, a girl under the age of 15 years, testified that she had sexual intercourse with the defendant, which fact, if true, if the defendant was 18 years of age, or over, would constitute the crime of rape on the part of the defendant. The evidence shows that, at the time in question, the defendant was much over 18 years of age. Before a conviction was justified, the prosecutrix must have been corroborated in some material respect. The evidence conclusively shows that she was pregnant and proof of pregnacy is corroboration of that phase of the crime of rape.

It is earnestly urged that there is no corroboration of the testimony of the prosecutrix that the defendant was the person who had sexual intercourse with her. An examination of the record discloses this to be a fact, unless

we consider that evidence of opportunity is corroboration. It, however, is not necessary to decide this point. It has long been the rule of this court that corroboration as to the identity of the person charged with rape is not necessary to sustain the charge. *Noonan v. State,* 117 Neb. 520.

We perceive no good and sufficient reason for a departure from that rule in this case. There can be no more reason for requiring corroboration as to the identity of the person charged with rape than the identity of one charged with any other major offense; but there is good reason for the requirement that there shall be corroboration of the prosecutrix which may consist of circumstances and is not limited to the principal fact. *Swogger v. State,* 115 Neb. 621.

There is a strong probability that a woman of previous good repute, when called upon to relate facts surrounding sexual relations, will give an account which negatives rather than affirms acquiescence or voluntary participation.

The defendant complains of instruction No. 5, relating to the question of corroboration. The instruction in its first paragraph sets forth correctly the general rule with reference to corroboration of the prosecutrix in this case. In the second paragraph the jury are told in part, the following:

"The unsupported testimony of the prosecutrix, or assaulted party, may be sufficient to identify the assailant if, when together with all other facts and circumstances in evidence, it convinces the jury of such identity beyond a reasonable doubt."

This is a correct statement of the law when considered along with other parts of the instruction, and without it, or language of similar import, the instruction would have been incomplete. We cannot, therefore, find any error in this portion of the charge to the jury when considered with the other instructions given by the court.

We have considered all other assignments of error and in them find no merit. The judgment of the district court was correct, and is

AFFIRMED.

ANDERS KAUSGAARD, APPELLEE, V. MICHAEL ENDRES ET AL., APPELLANTS.

FILED FEBRUARY 16, 1934. No. 28778.

1. **Witnesses.** "When an attorney is a witness for his client except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to other counsel." American Bar Ass'n Canons of Ethics (1926) 142, sec. 18.
2. ———. Except when essential to the ends of justice, a violation of the foregoing rule constitutes prejudicial error.
3. **False Imprisonment.** "In an action for false imprisonment against an officer for arresting without a warrant, the reasonableness of plaintiff's detention is a question for the court, where there is no conflict in the evidence as to the length of time and the circumstances under which the plaintiff was held. Where the facts are in dispute, it is for the jury to determine as to the reasonableness of the detention, under proper instructions by the court." *Diers v. Mallon*, 46 Neb. 121.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

Paul F. Good, Attorney General, Paul P. Chaney, Crossman, Munger & Barton and *Lester L. Dunn,* for appellants.

Burkett, Wilson, Brown & Van Kirk and *Hanson & Hanson, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

GOSS, C. J.

Defendants appeal from a judgment for $1,000 against

them as damages to plaintiff for false arrest and imprisonment.

Plaintiff, a merchant in Bellevue, Sarpy county, sued Michael Endres, state sheriff, and his surety, Fidelity & Casualty Company of New York, Harold W. Hulfish, deputy state sheriff, and his surety, Massachusetts Bonding & Insurance Company, Karl Greiner, sheriff of Seward county, Louis M. Anderson, detective sergeant, and Edward T. Sledge, an officer of the Omaha police department. The petition contained four counts: For false arrest and imprisonment; for malicious prosecution; for libel and slander; and for conversion of personal property. The case went to the jury on the first count and the trial court dismissed the other three. From this order of dismissal the plaintiff did not appeal.

Plaintiff was arrested at his store in Bellevue, in Sarpy county. The officers suspected him of buying goods and merchandise that had been stolen. Articles claimed by them to be of that nature were found in the store. Upon his arrest he was taken to Omaha, in Douglas county, and held in the jail overnight and until about 10 o'clock; then he was taken to Papillion, county seat of Sarpy county, and held in jail there and on trips to find justices of the peace until late in the afternoon, when the magistrate discharged him; until he was discharged he was not allowed to talk to his attorney; afterwards he was informed against but, upon trial in the district court, he was acquitted and brought this action later.

The defendants assign error because the trial court permitted Dewey Hanson, one of the attorneys for plaintiff, over objections of defendants, to participate actively in the trial as such attorney after he had testified as to material matters on behalf of plaintiff. He was a witness for plaintiff on direct examination and testified at considerable length as to material matters in several of the issues involved and as to the treatment of plaintiff while under arrest and imprisonment. After this testimony Mr. Hanson continued to participate in the trial. He was

also a witness in rebuttal to impeach or contradict the testimony of Garrow, the convicted thief who robbed country stores and claimed to have sold the stolen goods to Kausgaard, as to a conversation in the penitentiary when Garrow was serving a sentence. He cooperated with his associate counsel, conducted examinations and made an argument to the jury. The trial court, while ruling against defendants in this procedure, in effect warned plaintiff as to its legality.

At least three times we have criticized the legal ethics of permitting one to act both as attorney and witness. In *Wilson v. Wilson,* 89 Neb. 749, a divorce action, a reversal was ordered upon other grounds, but the court agreed with appellee's criticism of defendant-appellant's counsel who, the court said, was her "corespondent, an important witness for defendant, and assumes principal charge of the cause of defendant on trial." In *Cox v. Kee,* 107 Neb. 587, this court said: "An attorney is a competent witness for his client, and he may properly testify to mere formal matters, such as to account for the possession of an exhibit, or the like. But if he testifies generally, it is unbecoming for him to examine witnesses, or to address the jury." *In re Estate of Bayer,* 116 Neb. 670, we repeated what we had said in the *Cox* case and quoted from American Bar Ass'n Canons of Ethics (1926) 142, sec. 18, as follows: "When an attorney is a witness for his client except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to other counsel. Except when essential to the ends of justice, an attorney should scrupulously avoid testifying in court in behalf of his client."

The attorney ought not to have participated in the trial after he considered it necessary to present himself as a witness. The court ought not to have permitted it over objections of defendants. Its tendency was to prejudice the rights of defendants, particularly when the attorney argued the case to the jury. While the argument was not

preserved and the brief on behalf of plaintiff says Mr. Hanson did not there discuss his own testimony, nevertheless, if, as a witness, he made a good impression upon the jury, it would be difficult for them to separate what he said as an advocate from what he said as a witness. The presentation of his client's cause to the court and jury did not demand his personal attention. Able and experienced counsel were associated with him, who would have carried on the battle after he was disqualified for action. We are of the opinion this constituted prejudicial error, for which the judgment ought to be reversed.

Defendant officers complain of the refusal of the court to submit a requested instruction relating to liability for alleged cruel and harsh treatment of plaintiff while being arrested and detained. The first sentence of the instruction states the law when it gives the officers the right to use necessary force to safely keep plaintiff. But the second sentence was objectionable in that, by ambiguity, it gave the jury the right, if they found unnecessary force used, to decide the whole case upon liability for that alone. It said: "Then the defendants would be liable to the plaintiff for any injury or damage suffered by the plaintiff by reason alone and rising solely out of the use of such excessive force or violence wantonly or excessively inflicted." Other issues were involved in the case. The instruction was too broad and was properly refused.

The defendant officers assign that the tenth instruction given by the court was erroneous. This submitted to the jury whether there was an unreasonable delay between the arrest of plaintiff one afternoon and taking him before a magistrate on the afternoon of the next day. There was no conflict in the evidence as to the time. This was erroneous.

"In an action for false imprisonment against an officer for arresting without a warrant, the reasonableness of plaintiff's detention is a question for the court, where there is no conflict in the evidence as to the length of time and the circumstances under which the plaintiff was

held. Where the facts are in dispute, it is for the jury to determine as to the reasonableness of the detention, under proper instructions by the court." *Diers v. Mallon,* 46 Neb. 121. See 25 C. J. 550; *Keefe v. Hart,* 213 Mass. 476; *Oxford v. Berry,* 204 Mich. 197. On another trial, if there be no conflict in the evidence as to the length of time of detention, this matter should be decided by the court as a matter of law.

The surety companies place reliance upon the proposition that a surety cannot be held for the acts of a state sheriff and his deputy when committed merely under color of office, rather than by virtue of their office, and cite authorities thereon. We do not find it necessary to discuss this point further than to say that, in our opinion, under the pleadings and the evidence, the acts of the officers, in investigating the dealings of plaintiff and the arrest of plaintiff, came within the official jurisdiction of these state officers and were done by virtue of their offices. Whether they committed a wrong and, in so doing, damaged the plaintiff is the controversy here.

The judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

HARRY M. LUX ET AL. V. STATE OF NEBRASKA.

FILED FEBRUARY 16, 1934. No. 28926.

1. **Contempt.** Section 20-2121, Comp. St. 1929, specifically gives every court of record power to punish by fine and imprisonment, or by either, "Any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts."
2. ———: INFORMATION: VERIFICATION. An information charging constructive contempt, if made by a county attorney, when direct and positive in its charging part, need not be verified positively, but may be made on information and belief. *Tasich v. State,* 111 Neb. 465.
3. **Criminal Law:** CONTINUANCE. "The granting or refusing of

a continuance of a criminal cause rests in the sound discretion of the court, and a ruling in that regard will not be disturbed on review, in the absence of a showing of an abuse of discretion." *Dinsmore v. State*, 61 Neb. 418.

4. Contempt: DEFENSE. The so-called foreclosure moratorium act, Laws 1933, ch. 65, Comp. St. Supp. 1933, secs. 20-21,159 to 20-21,164, is not available to defendants.
5. ———: PENALTY. The fines of defendants were neither excessive nor inconsistent.

ERROR to the district court for Saline county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Harry E. Holeman, Alice M. Holeman and *Maxey & Maxey*, for plaintiffs in error.

Paul F. Good, Attorney General, and *William H. Wright, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

GOSS, C. J.

Harry M. Lux and Robert Jackson, also known as D. Robert Burleigh, hereinafter called defendants, were found guilty of contempt of court. Lux was ordered to pay a fine of $250 and certain costs, Burleigh to pay a fine of $100 and certain costs, and to be committed to jail until such fines and costs were paid. After their motions for new trials were overruled they brought proceedings in error. No bill of exceptions was secured. Only the transcript was brought up.

The information charged these and fourteen other defendants with the execution of a concerted plan and wilful attempt to impede and obstruct the due administration of justice in a described cause then pending in the district court for Saline county for the foreclosure of a real estate mortgage and a sale thereunder. It alleged that the sheriff had been duly ordered by the court to sell said real estate at the east front door of the county courthouse at 1 o'clock p. m. on March 14, 1933; that about 10 minutes before the hour so set, the defendants and

many others, with intent to prevent the sale, assembled in the private office of the sheriff, locked the door so he could not go to officiate at the sale, locked the windows and disconnected the telephone, so he could not communicate with any one outside said office; though he told them about three minutes before he was to open the sale that he had that legal duty to perform, the defendants informed the sheriff that he could not hold any foreclosure sale on that day, crowded him so he could not move, took hold of his person and stood around him in a menacing manner, prevented him from leaving the office, wilfully and unlawfully held him in his office against his will for about an hour and thereby prevented him from making the sale. The sheriff was finally released, when some were ejected forcibly from the office by citizens of Wilber and others were dispersed therefrom by a tear gas bomb which was thrown into said room.

Harry M. Lux filed an "answer and showing" in opposition to the information. In this he described himself as "a resident of Lancaster county, Nebraska, and has been working for and is now employed as an organizer for the Holiday Association, * * * and that he was in Wilber on or about March 14, 1933, being interested in the prosperity of the rural communities and their accomplishments through collective effort. That he was not a leader of any group or gathering but here for the purpose of being informed of the results growing out of the moratorium act and other legislation for the interest of the rural communities. * * * That no acts transpired by him or his associates that did intimidate, suppress, or in any manner hinder or violate the free, voluntary actions of any court official. Defendant generally denies each and every material allegation in the complaint. * * * That the acts * * * of this defendant were harmonious, lawful, and in accord with the rights of every citizen of the United States to lawfully assemble and discuss their inherent rights."

Defendants assign that the district court was without

power or jurisdiction to punish them for contempt in such manner or form and that the records fail to show any obstruction or hindrance.

Section 20-2121, Comp. St. 1929, specifically gives every court of record power to punish by fine and imprisonment, or by either, "Any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts."

The form of the information is clear and specific. It was not attacked by demurrer or by motion to quash. True, it was not verified positively but was verified by the county attorney upon information and belief, but this court held, in *Tasich v. State*, 111 Neb. 465, that an information in a constructive contempt case, made by a county attorney, when direct and positive in its charging part, need not be verified positively but may be made upon information and belief.

While the defendants did not bring up the bill of exceptions and therefore we do not have the evidence before us, the legal inference from the final order appealed from is that the facts charged were presented by evidence to the trial court and justified the findings and judgment.

Error is assigned because the court did not grant what counsel for defendants considered sufficient time to prepare the defense. The record shows the information was filed March 17, 1933. On the same day an order to show cause was issued and defendants were at once served with copies of the complaint. The order to show cause gave them five days' notice and set the hearing for March 23. Defendants employed counsel March 18. March 23 they moved for a continuance (without suggesting a date). The court continued the case to the next day. The trial began on March 24, 1933. The journal entry of that day recites that all defendants were present in court "and all being represented by counsel, except the defendant Sylvester Mendoza, * * * all announce that they are ready to proceed to trial." "The granting or refusing of

a continuance of a criminal cause rests in the sound discretion of the court, and a ruling in that regard will not be disturbed on review, in the absence of a showing of an abuse of discretion." *Dinsmore v. State,* 61 Neb. 418. See *Ringer v. State,* 114 Neb. 404; *Biddick v. State,* 113 Neb. 851; *Dilley v. State,* 97 Neb. 853.

Defendants say the district court erred in failing to take into consideration the act of March 2, 1933, known as the foreclosure moratorium act. Laws 1933, ch. 65, Comp. St. Supp. 1933, secs. 20-21,159 to 20-21,164. The first section makes that act usable "upon application of the owner or owners of said real estate or persons liable on said mortgages," etc. There is nothing in the record suggesting the right or power of these defendants to invoke the provisions of the act. They were neither owners nor liable on the mortgage. All inferences from the record indicate that they were uninvited strangers, crashing the doors, who now seek to avoid punishment for their bad legal manners.

Defendants complain that the fines imposed are inconsistent because of their difference. They ask, "if both parties are equally guilty of contempt of court, or conduct constituting contempt of court, why should not their fines be the same?" The answer would be found in the evidence, which is not before us. We assume the court had good reason to decide that Lux was more of a leader and organizer of the raid than Burleigh. We find no abuse of discretion on the part of the trial court. The fines of defendants were neither excessive nor inconsistent. The defendants were fortunate that they were let off with fines; the statute authorized imprisonment. In *Tasich v. State, supra,* prosecuted for attempting to obstruct the administration of justice (but not succeeding in the attempt), the district court committed the defendant to jail for six months and this court affirmed the judgment. Here the defendants succeeded in preventing the judicial sale.

Under our plan of government the judicial department

may not lawfully be intimidated by threats, coerced by force, or influenced by anything outside the facts and the law. It was timely and fortunate for the cause of law and order that the unlawful scheme of defendants was promptly frustrated by a resolute prosecutor and a courageous judge.

The judgment was right and it is

AFFIRMED.

IN RE YELLOW CAB & BAGGAGE COMPANY.

FILED FEBRUARY 16, 1934. No. 28470.

1. **State Railway Commission:** HEARINGS: CONTINUANCE. State railway commission is vested with discretion in granting continuance of hearing in proceeding pending before it. Its ruling upon application for continuance will not be disturbed unless it appears there was an abuse of discretion.
2. **Automobiles:** TAXICAB COMPANIES: REGULATION. Taxicab companies are common carriers. The control and regulation of their operation is vested in the state railway commission, in absence of such control and regulation by specific legislation.
3. ———: ———: ———. Subdivisions 17, 18, and 25 of section 14-102, and sections 14-109 and 14-110, Comp. St. 1929, being parts of the statutory charter of cities of the metropolitan class, are not such specific legislation as will deprive the state railway commission of jurisdiction over the control and regulation of the operation of taxicab companies in the city of Omaha.
4. ———: ———: ———. Sections 60-101, 60-102, and 60-326, Comp. St. 1929, being parts of the chapter on motor vehicles, are not such specific legislation as will deprive the state railway commission of jurisdiction over the control and regulation of the operation of taxicab companies.
5. ———: ———: ———. Section 74-1101, Comp. St. 1929, being part of the chapter dealing with street railways, is not such specific legislation as will deprive the state railway commission of jurisdiction over the control and regulation of the operation of taxicab companies.
6. ———: ———: ———. Regulation adopted by the state railway commission, requiring taxicab companies to obtain

certificates of convenience and necessity, is not unreasonable or arbitrary.

7. ———: ———: ———. Regulation of the state railway commission, requiring companies operating taxicabs to equip them with taximeters, *held* to be a reasonable regulation.

8. **State Railway Commission:** POWERS. Failure or refusal of the state railway commission to adopt a rule or regulation which, in its nature, is legislative is not the subject for review by this court.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

Francis P. Matthews, John P. Breen and *W. P. Kelley,* for Publix Cars, appellant.

Kennedy, Holland & De Lacy and *Ralph Svoboda,* for Omaha & C. B. Street R. Co., appellee.

Paul F. Good, Attorney General, and *Edwin Vail,* for Nebraska State Railway Commission.

Hugh H. Drake, amicus curiæ.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

GOOD, J.

This is an appeal from the action of the state railway commission in promulgating certain rules and regulations governing the operation of taxicabs in the city of Omaha. The Yellow Cab & Baggage Company and six other taxicab companies joined in filing an application before the commission, requesting it to enter an order establishing rules and regulations. Omaha & Council Bluffs Street Railway Company intervened and asked for the same relief. Publix Cars, a corporation operating in Omaha a taxicab business on a substantially different basis from the other taxicab companies, appeared before the commission and filed objections to the application. The commission set a time for hearing, and Publix Cars requested an extension of time, so that it might present its side of the matter. After hearing a part of the evidence, the

commission adjourned the hearing for five days, and thereupon Publix Cars introduced its evidence. After hearing and argument, the commission entered an order which will be more particularly referred to later in this opinion. From that order, Publix Cars appealed. All of the other taxicab companies and intervener filed a cross-appeal.

Publix Cars, hereinafter referred to as appellant, complains of the action of the railway commission in not granting it a continuance for a greater length of time in order to present its contentions. It does not appear that appellant desired to call any other witnesses than those who were called, or that it did not have all the facts in evidence before the commission that might have been produced. The question of continuing a hearing before the commission is one within its discretion, and its action in granting or refusing a continuance will not be interfered with unless an abuse of such discretion is shown. The record shows no abuse of discretion.

Appellant contends that the railway commission is without any power to regulate the business of taxicab companies within the city of Omaha, and that the city of Omaha, under its charter provisions, has power to establish all rules and regulations for the conduct and operation of taxicab business within its borders.

In 1906 the people of Nebraska adopted an amendment to the Constitution, providing for the creation of a state railway commission, and which now appears as section 20, art. IV of the Constitution. That section, among other things, provides: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." After the adoption of this amendment, the legislature in 1907 adopted a comprehensive act, defining the powers and duties of the railway commission, and providing generally the au-

thority that the commission might exercise over common carriers. Section 4 of that act, being section 75-401, Comp. St. 1929, defines the term "common carriers" to include "all corporations, companies, individuals and association of individuals, * * * that may now or hereafter own, operate, manage or control any railroad, interurban or street railway line * * * express company, * * * and any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire." This statute brings taxicab companies within the term "common carriers," and that they are such common carriers is recognized by this court in *Peterson v. Beal,* 121 Neb. 348. See, also, *Terminal Taxicab Co. v. Kutz,* 241 U. S. 252, 60 L. Ed. 984; *Anderson v. Yellow Cab Co.,* 179 Wis. 300; *City Cab Corporation v. Patrick,* P. U. R. 1932C, 1. It thus appears that the commission, both by Constitution and statute, is given power to regulate and control the operation of common carriers.

Relative to the powers conferred upon the state railway commission by the constitutional provision above quoted, it was held in the case of *In re Lincoln Traction Co.,* 103 Neb. 229: "Unless there has been specific legislation that might limit or affect this power given to the commission, it would seem that the people have given this commission all the control over common carriers that they themselves could exercise." And such we deem to be the rule. The question then arises: Is there any specific legislation that limits or affects the power of the commission to act in the premises? Appellant contends that the provisions of the Omaha charter are specific legislation which confers this power upon the city council of Omaha and thus deprives the commission of the power to enact the rules and regulations. The distinction between specific and general legislation is drawn in *State v. Clarke,* 98 Neb. 566.

To support its contention that the city of Omaha, and not the state railway commission, is vested with authority to promulgate rules and regulations governing the operation of taxicabs within the city, appellant cites and relies

upon subdivisions 17, 18, and 25 of section 14-102, sections 14-109 and 14-110, Comp. St. 1929. These sections are all parts of the statutory charter of cities of the metropolitan class, in which the city of Omaha belongs.

Subdivision 17 of said section 14-102 authorizes the council "To regulate the transportation of articles through the streets, and to prevent injuries to the streets from overloaded vehicles, and regulate the width of wagon tires, and tires of other vehicles." Clearly, this has no application to the question under consideration. Subdivision 18 of said section provides: "To prevent or regulate the rolling of hoops, playing of ball, flying of kites, the riding of bicycles or tricycles, or any other amusement or practice having a tendency to annoy persons passing in the streets or on the sidewalks, or to frighten teams or horses. To regulate the use of vehicles propelled by steam, gas, electricity, or other motive power, operated on the streets of the city." Evidently this relates to the police power to control the manner of the use of the streets. The city council no doubt is vested with power to regulate the rate of speed, parking privileges, the manner of turning to the right or left, and other regulations of that character. Primarily, the provision is to regulate the use of the streets for the protection and safety of the public, and not to the general control of taxicab companies or other common carriers. Subdivision 25 of said section confers on the city council the power to make and enforce all police regulation for the good government, general welfare, health, safety and security of the city and its citizens. This provision in no manner gives to the city general control and regulation of common carriers.

Section 14-109 authorizes the imposition of occupation and license taxes and for registration of vehicles. Section 14-110 merely provides that where any power is conferred upon the city, and the manner of its exercise is not especially pointed out, the council may exercise that power by ordinance.

Appellant also cites and relies upon sections 60-101, 60-

102, and 60-326, Comp. St. 1929. These are sections of the motor vehicle chapter. Section 60-101 defines "motor transportation company" for the purpose of that act and provides that the term shall not include persons, companies or associations, operating motor vehicles exclusively for the transportation of persons and baggage, and which are operated exclusively within the limits of a municipal corporation. Section 60-102 provides: "The Nebraska state railway commission shall have general control of the common carriers mentioned in section 1 hereof (60-101) and is hereby vested with authority to make reasonable regulations, except the fixing of rates or fares to be charged, governing each motor transportation company in this state; is vested with authority to regulate the service and safety of operation of each such motor transportation company in this state; to require said common carriers to file annual and other reports, containing such information and data as the commission may require, and to provide uniform accounting systems." We fail to find in these sections that any power is given to the city to regulate the general control of taxicabs. Section 60-326 provides: "Nothing contained in the provisions of this article shall be construed to limit the power of local authorities to make, enforce and maintain any ordinances, rules or regulations, in addition to the provisions affecting motor vehicles." This is a negative provision only, and does not purport, in itself, to confer any power upon the city to exercise general control over the operation of taxicabs or other common carriers.

Appellant also cites section 74-1101, Comp. St. 1929. This is a section of the article dealing with street railways. After defining the term "street railway" and authorizing extension of the street railway service by motor busses, the section concludes with this language: "Nothing in this act shall be construed to deprive any city of this state of the right and power to grant licenses issued by the proper city authorities to other auto or motor busses, taxicabs or vehicles, to use the streets of

the city in carrying passengers for hire, and to regulate such carriers as to rates, fares and service." This, again, is a negative provision limiting the scope of the article on street railways and does not, in terms, confer any powers upon cities to control and regulate the operation of taxicabs or other common carriers.

We are unable to accept appellant's view that the statutory provisions above referred to answer to the call of "specific legislation," mentioned in section 20, art. IV of the Constitution. All of the provisions referred to are general in their nature and not specific legislation, within the meaning of the constitutional provision. None of these provisions is availing to take from the railway commission the power to regulate and control the operation of common carriers.

Appellant cites and relies upon the opinion of this court in *Omaha & C. B. Street R. Co. v. City of Omaha,* 114 Neb. 483. It may be conceded that there are some expressions in the opinion which apparently lend support to appellant's contention. It must always be borne in mind that what is said in the opinion must be construed in the light of the question before the court for determination. That was an action to enjoin the enforcement of a city ordinance. Many grounds for the invalidity of the ordinance were urged, among them that it granted a franchise without having complied with the statutory and charter provisions relative to the granting of franchises. A general demurrer to the petition was filed and was overruled by the trial court. The following appears in the judgment of the court in that case: "The court upon due consideration finds and concludes that any permit or license issued or attempted to be issued by the defendant city or its officers under the provisions of the ordinance No. 12696, attached to plaintiff's petition as exhibit 1, would be a granting of a franchise to the licensee within the meaning of the city charter of the city of Omaha section 3719, Statutes of 1922, and hence the court overrules the defendant's demurrer to the plain-

tiff's petition." Defendant elected to stand upon its demurrer and refused to further plead. The injunction was thereupon granted by the trial court. The decision of the trial court was based exclusively upon the proposition that the ordinance granted a franchise without having complied with statutory and charter provisions relative to the granting of franchises. The only question for determination by this court upon appeal was whether the court erred in that holding. The only question properly before the court for decision was whether the ordinance granted a franchise, and any holding that the ordinance was valid should be construed to mean only that it was not vulnerable to the charge that it granted a franchise.

We have no doubt that, under the charter provisions, the city of Omaha is vested with police power to regulate the use of its streets by taxicabs or other vehicles; that it may require an occupation or license tax from those operating such; that it may, in some respects, regulate manner of operation of vehicles on the streets; but this does not amount to giving to the city the general control and regulation of the operation of taxicabs or other common carriers.

The city is authorized to legislate as to matters which are strictly local or municipal, while the railway commission enacts rules and regulations which are matters of general public or state concern. It is difficult to draw a line marking the distinction between those matters which are of local or municipal concern and those which are of a general nature. The court must consider each case from the facts and circumstances peculiar to it and draw the line of demarcation in that particular case. *Omaha & C. B. Street R. Co. v. City of Omaha,* 125 Neb. 825; *Carlberg v. Metcalfe,* 120 Neb. 481.

It must be borne in mind that any power given to a city must be strictly construed. If the grant of power is in doubt, the power will be held not to exist. Of course, the city has the implied powers which are necessary to the exercise of those specially granted. A differ-

ent rule obtains with reference to the railway commission. It derives its power generally from the Constitution and, as above stated, has plenary power with reference to the control and regulation of common carriers, in the absence of specific legislation. The powers of the railway commission, therefore, are to be liberally construed, while those of the city are to be strictly construed. The plenary power of the railway commission may only be curtailed or diminished where the legislature has, by specific legislation, occupied the field. No provision by the legislature has been pointed out, nor are we aware of any, which occupies the field with reference to the control and regulation of taxicabs, and, therefore, we conclude that such power is vested in the railway commission.

Appellant complains that certain of the regulations, contained in the commission's order, are unreasonable, arbitrary and confiscatory of its property and property rights. It complains of the regulation which requires taxicab companies to make application for and obtain certificates of convenience and necessity before they may operate within the city. The regulation does provide that such certificates will be issued as a matter of course, upon application, to all taxicab companies for the number of cabs they were operating at the time the regulation was adopted. In other words, such certificate, as to existing taxicabs in service, was a mere formality, but such certificates are required by the regulation before any extension may be made to any taxicab system. Such certificates have been required in many of the states with reference to the establishment and the extension of public utilities. The object in requiring such certificates is not only to protect those already occupying the field in their investment, but to protect the public as well. Unreasonable and unwarranted competition might be carried to the extent that it would not only injure and jeopardize the property of those operating the utilities, but might even result in destroying them. Such a result might be disastrous to the interests of the public.

In the instant case, it appears that street railways are necessary for mass transportation. If an unnecessary and unreasonable number of taxicabs are authorized to operate in the city and along the lines of the street railway, it may result in destroying the street railways to the great detriment of the public interest. It has now come to be recognized that unwarranted competition, especially in the line of public utilities, may be and frequently is harmful to the public interest, as well as to those engaged in such competition. Certificates of convenience and necessity for the addition and extension of service in public utilities are, therefore, to be considered a proper regulation.

Appellant complains particularly of regulations Nos. 3 and 4. Regulation No. 4 requires all taxicabs to be equipped with a practicable standard fare-registering device, or instrument, commonly known as a taximeter, that will measure the distance traveled by the vehicle, to which it is attached, and record, by figures or design, the fare determined or charged in dollars or cents, pursuant to such measure of distance or record of time. Regulation No. 3 provides that all fares shall be computed and determined on a mileage basis, plus waiting time, and recorded on a taximeter, and that no operator shall charge, or attempt to charge, any passenger a greater rate of fare than that to which the taxicab is entitled. It is a matter of common knowledge that taxicabs generally are equipped with taximeters, and that they are necessary to prevent persons or passengers using these taxicabs from being overcharged; that they may know exactly the charge for which they are liable, and not left to the mercy of any driver or operator of such vehicle. We think the regulations are reasonable, are not arbitrary, and are not confiscatory. In fact, most reputable taxicab companies have voluntarily, without requirement, installed taximeters in their cabs as a protection to the public and to the owners.

The Yellow Cab & Baggage Company and the other tax-

icab companies that joined with it in the application to the railway commission, together with the intervener, have filed a cross-appeal, because of the refusal or failure of the commission to fix a minimum fare for taxicabs. It is said that the commission refused or failed so to do because of section 75-1001, Comp. St. 1929, which provides: "No public body in this state authorized to fix rates for the service of any public utility shall establish other than maximum rates, and any minimum rate established by said body shall be deemed null and void." Upon the one hand, it is contended that said section is specific legislation and prevents the railway commission from adopting any order or regulation fixing minimum fares. On the other hand, it is contended that the statute is not specific legislation, within the meaning of the constitutional amendment, and in no way affects the power of the commission to adopt a rule or regulation providing for minimum fares.

It is unnecessary to pass upon the validity of the statute or its effect. If, without the statute, the commission did not deem it proper or wise to enact a rule fixing a minimum fare, that was a matter for it to determine. It would be, in effect, a legislative act of the commission, and failure to adopt a legislative act is not a subject for review by the court. We find no merit in the cross-appeal.

It follows that the order of the railway commission, in so far as involved in this appeal and passed upon in the opinion, is right and is

AFFIRMED.

PAINE, J., dissents.

EBERLY, J., concurring separately.

I concur in the result and the statement of the law as set forth in the syllabus, but do not agree with the views expressed by the learned author of the opinion on the subject of the powers of metropolitan cities as defined and conferred by charter, and which, in the absence of affirmative action on any particular subject involved by

the state railway commission, might be lawfully exercised by such city.

I am in harmony with the view that these grants of power to the municipality are general in their nature, may not be deemed "specific legislation" in the constitutional sense of that term, and must be now regarded as expressly subject and subordinate to rules and regulations of the state railway commission lawfully adopted within the scope of its constitutional powers.

JAMES CORCORAN ET AL., APPELLANTS, V. LEON'S, INC., ET AL., APPELLEES.

FILED FEBRUARY 16, 1934. No. 28668.

1. **Contracts**: OFFER: ACCEPTANCE. "An acceptance may be transmitted by any means which the offerer has authorized the offeree to use and, if so transmitted, is operative and completes the contract as soon as put out of the offeree's possession, without regard to whether it ever reached the offerer, unless the offer otherwise provides." Restatement, Contracts, sec. 64.
2. **Landlord and Tenant.** "A tenancy from year to year will be presumed, where a tenant remains in possession after the expiration of his term, and his tenancy is recognized by the landlord." *West v. Lungren*, 74 Neb. 105.
3. ———. "This rule is, however, only a rule of presumption, and the presumption is rebutted by proof of a different agreement, or of facts inconsistent with the presumption." *West v. Lungren*, 74 Neb. 105.
4. ———. Evidence examined, and *held* ample to rebut the presumption that the occupancy of the leased premises by defendant from March 1, 1929, to February 28, 1930, was of such a character as to impose on it the obligation of continued payment of rent after the termination of that period.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

S. L. Winters, for appellants.

Leon & White, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and CLEMENTS, District Judge.

EBERLY, J.

This is an action at law by James Corcoran and wife against Leon's, Inc., (a corporation) for rent of a storeroom and basement owned by plaintiffs, situated in Omaha, Nebraska, for the period commencing March 1, 1930, and terminating in May, 1931. Issues were joined by the defendant, and the trial, in which by agreement of parties a jury was expressly waived and the cause submitted to the court for determination, resulted in findings for the defendant and judgment dismissing the action. Motion for new trial was overruled, and plaintiffs appeal.

The undisputed facts are that defendant occupied the premises referred to from March 1, 1924, to February 28, 1929, under the terms of a written lease for five years, executed by the parties to this litigation. The covenants of this lease were performed, and all rent reserved was paid promptly. In the months of January and February, 1929, oral negotiations were carried on in the city of Omaha by the parties to this litigation for the purpose of securing a renewal or extension of this five-year lease, which, by its terms, expired on the last day of February of that year. All parties were residents of Omaha and the conferences were carried on by personal interviews as well as by use of the telephone. As the result of these efforts, excepting as to the amount of the monthly rental to be paid, a substantial agreement had been arrived at extending the terms of this five-year lease for the period of an additional year. On the subject of the monthly rental there was as yet no meeting of minds. Finally, on January 24, 1929, a letter in behalf of plaintiffs, duly subscribed, was transmitted by mail to defendant, from which we quote the following: "Since our conversation at your store, some ten days ago, relative to terms for renewal of lease on your Leon Store in South Omaha, which lease expires on March 1, 1929, will say that I am

obliged to notify you that I cannot make any concession to you relative to the reduction in rent. * * * Please notify me if you desire to continue to lease this building, at your earliest convenience."

By a letter dated February 1, 1929, the defendant replied to the foregoing communication. This letter of reply is, in part, as follows: "We are in receipt of your letter of Jan. 24. We believe your attitude is a most unreasonable one in view of the fact that property values have fallen and business conditions no longer justify such high rents. However, since we have already committed ourselves to purchases of merchandise for the next six months, we have decided to accept your proposition to hold over for one year at the same rental and under the terms and conditions of our present lease."

Plaintiffs deny receipt of this letter, and challenge the sufficiency of the testimony to establish this fact. However, the evidence is uncontradicted, and corroborated, that this letter of February 1 was dictated and signed by the authorized representatives of defendant; that it was placed in an envelope properly addressed, and with the necessary postage affixed thereto was on the day of its date deposited in the United States mail at Omaha, Nebraska.

The trial court expressly found that a contract was entered into, by virtue of this exchange of letters referred to above, for a lease for one year commencing March 1, 1929, and terminating February 28, 1930. This conclusion, omitting consideration of the question of the effect of the statute of frauds, the evidence amply supports.

The governing principle on this question appears to be that, where a person makes an offer and requires or authorizes the offeree, either expressly or impliedly, to send his answer by post, the acceptance is communicated and the contract is completed from the moment the acceptance is mailed. *Burton v. United States,* 202 U. S. 344; *Tayloe v. Merchants Fire Ins. Co.,* 9 How. (U. S.) 390, 399, 400; *Patrick v. Bowman,* 149 U. S. 411, 424;

Adams v. Lindsell, 1 B. & Ald. (Eng.) 681; *Henthorn v. Fraser* (1892) 2 Ch. (Eng.) 27; *Wester v. Casein Co.*, 125 N. Y. Supp. 335; *Bluthenthal v. Atkinson*, 93 Ark. 252; *Campbell v. Beard*, 57 W. Va. 501.

"The request or authorization to communicate the acceptance by mail is implied * * * where a person makes an offer to another by mail and says nothing as to how the answer shall be sent." 13 C. J. 300.

"Since agreements made by means of the post * * * are simply an illustration of the general rule before stated that the offerer takes the risk as to the effectiveness of communication if the acceptance is made in the manner either expressly or impliedly indicated by him, it necessarily follows that the contract is complete as soon as the letter containing the acceptance is mailed, * * * and it makes no difference whatever that, through mistake of the post office authorities * * * or through accident in transmission, it is delayed or is lost in transit and never received by the offerer." 13 C. J. 301.

In short, "An acceptance may be transmitted by any means which the offerer has authorized the offeree to use and, if so transmitted, is operative and completes the contract as soon as put out of the offeree's possession, without regard to whether it ever reached the offerer, unless the offer otherwise provides." Restatement, Contracts, sec. 64.

But, considered wholly without reference to the letter of plaintiffs dated January 24, and the rule as to implied authorization invoked thereby, we are persuaded that the presumption that was created by the facts disclosed in the evidence, viz., that defendant's letter of February 1 reached the addressee in due course of mail, is not rebutted by the proof offered in behalf of plaintiffs; that the question of fact arising from the conflicting evidence on this subject was for the trial court to determine, and that its judgment thereon is conclusive on this as a tribunal of review. *Papillon v. Brunton* (1860) 5 H. & N. (Eng.) 518; *Gresham House Estate Co. v. Rossa Grande Mining*

Co. (1870) W. N. (Eng.) 119; *National Masonic Accident Ass'n v. Burr,* 57 Neb. 437; *City of Omaha v. Yancey,* 91 Neb. 261; *Heyen v. State,* 114 Neb. 783; *Leininger v. North American Nat. Life Ins. Co.,* 115 Neb. 801.

Further, the evidence fairly established that, in reliance on the validity of the agreement effected by the oral negotiations and the two letters already referred to, defendant continued in possession of the premises after the expiration of its five-year lease for the period of the year terminating on February 28, 1930; that it paid the monthly rental of $275 as promised in its letter of February 1, which was accepted by plaintiffs; that it complied with all the other provisions of its lease, and tendered possession of the demised premises to plaintiffs and abandoned possession thereof on or prior to the last day of its extended term.

Plaintiffs insist that the lease, which defendant claims the evidence establishes for the year ending February 28, 1930, is not in writing, is not signed by the lessor, and is void under the statute of frauds (Comp. St. 1929, sec. 36-103); that the defendant, remaining in possession after the termination of the five-year lease, claiming under a void lease, and thereafter making payments of rent, became thereby a tenant from year to year, for the termination of whose tenancy the service of a six months' notice was necessary, which had not been given; further, that until such service of notice had been made upon the lessee its liability for rents would continue indefinitely. Under the facts in the instant case we are unable to agree with plaintiffs' contention. Of course, it is true that "A tenancy from year to year will be presumed, where a tenant remains in possession after the expiration of his term, and his tenancy is recognized by the landlord." *West v. Lungren,* 74 Neb. 105. But, "This rule is, however, only a rule of presumption, and the presumption is rebutted by proof of a different agreement, or of facts inconsistent with the presumption." *West v. Lungren,* 74

Neb. 105. See, also, *Montgomery v. Willis*, 45 Neb. 434; *Bradley v. Slater*, 50 Neb. 682.

The exact issue presented in this case for determination is not the validity of the extension agreement, for that has been fully performed. It is rather the legal effect of this act of the parties in view of the provisions of the statute of frauds, as negativing, preventing, or terminating the liability of the tenant for continued payment of rent indefinitely, in the absence of the service of a six months' notice by it. It will be noted that the liability here sought to be enforced is an incident of the five-year lease which, when coupled with continuing possession of the tenant after expiration thereof, and no further agreement disclosed, the lessee at his option may ordinarily enforce. It arises by implication of law. The nature of an estate from year to year is a lease for a year certain with a growing interest during every year thereafter, springing out of the original contract and parcel of it. *Legg v. Strudwick*, 2 Salk. (Eng.) 413; Bac. Abr., Leases, L. 3, 621. See, also, *Oxley v. James* (1844) 13 M. & W. (Eng.) 208. If the identical terms, which appellants contend are implied by law, were actually expressed in the formal provisions of the five-year lease, even conceding arguendo that the extension agreement in this case rests wholly on parol, it may not be doubted that the mutual rights of the parties would be determined by its terms, notwithstanding the statute of frauds. This court is committed to the view that, "While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration." *Bowman v. Wright*, 65 Neb. 661. True, "Where * * * the contract is one required to be in writing by the statute of frauds, there must be consideration for a modification by waiving some of its requirements, or else such new agreement must be executed." However, where the lessee has not covenanted, and is not bound, to remain in possession for any purpose, continuing in possession at the

request of the lessor may be a valid consideration for a modification by waiving some of the requirements of his lease or changing the obligations thereof. See *Bowman v. Wright, supra.* In the instant case the renewal agreement was fully performed, and in reliance on the new agreement and in compliance with what was tantamount to a request of the lessor, defendant continued in possession of the leased premises after all possible duty so to do had expired under the five-year lease on February 28, 1929. It would seem that the power to thus change the terms of a written lease by parol undertakings would necessarily include the power to terminate or modify the incidents growing out of the same which spring out of the original contract and are a parcel of it.

But, is plaintiffs' position in this transaction such as permits them to invoke the protection of the statute of frauds as an essential element of their cause of action? In February, 1929, prior to the renewal agreement, defendant was charged with no duties to plaintiffs with reference to the demised premises, save to surrender it by midnight of February 28. Its five-year lease ended at that time, and its obligations would terminate with the seasonal delivery of possession thereof. However, it was induced by the request of plaintiffs, made orally and in writing, to enter into this contract of extension, and in reliance thereon, "amid the silence of plaintiffs," to remain in possession and pay rent as stipulated therein, after the termination of the five-year lease. Defendant remained in occupancy of the premises for the entire period of extension agreed upon, paid all rent accruing therein, kept its covenants created thereby, and surrendered or tendered the surrender of its leasehold in prompt conformity with the terms of its undertaking.

Plaintiffs now challenge this contract of extension as contravening the statute of frauds, and void; and by this action seek to impose upon defendant the burden of continued payment of rent as a tenant from year to year holding over under the terms of the five-year lease. This

liability was expressly negatived by the terms of the renewal contract, and its existence would have been utterly impossible without the continued possession of the leasehold by the defendant after February 28, 1929, which the contract now challenged induced.

In this connection it is to be remembered that this court is committed to the view that "The statute of frauds does not render a contract void, but voidable at the option of either party. But it does not require a party to ignore considerations of moral obligation, equity, and good faith, by pleading the same." *Bodie v. Robertson,* 113 Neb. 408. See, also, *Cresswell v. McCaig,* 11 Neb. 222.

Obviously, the plaintiffs are seeking to employ the statute of frauds as a sword, and are not attempting to make use of it as a shield. The circumstances here presented invoke the application of the following well-established principles:

"The statute of frauds, designed to prevent fraud and perjuries, will not be allowed to operate as a means of fraud either in permitting one guilty of fraud to shelter himself behind it, or in allowing its use as a means of perpetrating fraud." 27 C. J. 302.

"The statute of frauds can only be invoked to avoid an oral contract in case one is free from deceit and false representations." *Griffin v. Bankers Realty Investment Co.,* 105 Neb. 419. See, also, *Norton v. Brink,* 75 Neb. 566.

But the facts before us suggest another consideration. If this tenancy, due to the invalidity of the renewal lease, is to be deemed from year to year, still the right to terminate such a tenancy is an inseparable incident thereof. *Doe v. Browne* (1807) 8 East. (Eng.) 165; *Holmes v. Day,* 8 Ir. R. C. L. 235; *Western Transportation Co. v. Lansing,* 49 N. Y. 499. The approved method in accomplishing this result is by agreement of the parties, express or implied, or by notice given six calendar months ending with the period of the year at which the tenancy commenced. *Critchfield v. Remaley,* 21 Neb. 178. The six

months' notice may be either in writing or verbal. 2 Taylor, Landlord and Tenant (9th ed.) 482; *Lord Macartney v. Crick*, 5 Esp. (Eng.) 196; *Timmins v. Rowlinson*, 3 Burr. (Eng.) 1603; *Eberlein v. Abel*, 10 Bradw. (Ill.) 626; *Thamm v. Hamburg*, 7 Phila. (Pa.) 266. And such notice may be served so as to afford the party notified six months before the expiration of the next or any following year. *Right ex dem. Flower v. Darby* (1786) 1 T. R. (Eng.) 159.

It appears in the case of *General Assurance Co. v. Worsley* (1895) 64 L. J. Q. B. (Eng.) 253: "On the 11th of January, 1892, a tenant wrote to his landlord's agents as follows: 'I hereby give you notice that I wish to terminate my tenancy of the offices. Will you kindly let me know when my tenancy will expire?' The reply, dated the 13th of January, was: 'On referring to your agreement we find that six months' notice must be given to terminate on the 1st of July in any year; you therefore hold the rooms till July, 1893.' Held, that a valid notice to quit had been given and accepted, and that the tenant was not liable for rent after the 1st of July, 1893."

Under this rule it would seem that the letter of February 1 plainly discloses an intent on the part of the tenant to terminate the tenancy commencing on March 1, 1929, on the 28th day of February, 1930, and ample as a six months' common-law notice to accomplish that purpose.

However, it will be remembered that this jurisdiction is committed to the rule that the presumption arising from the continuance of a tenant in possession after termination of his term and the payment of rent may be rebutted by proof of "facts inconsistent with the presumption." *West v. Lungren*, 74 Neb. 105. As to the payment of rent, it was early determined that "The receipt of rent by the landlord is not conclusive as to the continuance of the term, but it is an equivocal act to be determined by the *quo animo*." *Pusey v. Presbyterian Hospital*, 70 Neb. 353.

In a case involving a question similar to the one here considered, the supreme court of Alabama, after pronouncing the rule as to presumption in terms similar to the one here adopted, further say: "Presumption of renewal of lease by tenant merely holding over is rebutted by proof of a new contract materially different from the original lease, and this, notwithstanding the new contract is void by the statute of frauds, because verbal, and not to be performed within a year from the making thereof." *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499.

In *West v. Lungren*, 74 Neb. 105, where the facts were that a tenant from year to year held possession for the agricultural year of 1902 (March 1, 1902, to March 1, 1903) under an oral agreement made November, 1901, for that period, this court, notwithstanding the reference to the statute of frauds in the briefs, held in effect that the oral lease followed by possession thereunder obviated the necessity of service of the six months' notice to terminate the tenancy.

It is obvious that the express determination of the force and effect of the statute of frauds in this case, and the validity of the contract of renewal as such, may not be required in the proper disposition of this case. We are convinced that the facts established by this record are at least wholly inconsistent with the presumption on which plaintiffs' cause rests, and are ample to rebut the same.

The judgment of the district court is correct, and is

AFFIRMED.

VERNON LEWIS, APPELLEE, V. RAPID TRANSIT LINES, APPELLANT: KENNETH PFLUG, APPELLEE.

FILED FEBRUARY 16, 1934. No. 28740.

1. **Appeal.** Assignments of error not made or discussed in appellant's brief will not be considered in the determination of an appeal.

2. **Trial.** The trial court properly denied appellant's motion for a directed verdict in its favor.
3. **Automobiles:** DUTY OF GUEST. Ordinarily, the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver; and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

Ziegler & Dunn and *George W. Becker,* for appellant.

Wear, Garrotto & Boland and *Crofoot, Fraser, Connolly & Stryker, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

BLACKLEDGE, District Judge.

This is an appeal from the district court for Douglas county wherein the action was one to recover damages for personal injuries alleged to have been sustained by the plaintiff in a collision which occurred between the automobile in which he was riding as a passenger, and which was driven by Kenneth Pflug, and a passenger bus being operated by the employees of the defendant Rapid Transit Lines.

The verdict of the jury was in favor of plaintiff and against defendant Rapid Transit Lines in the sum of $4,250, and was in favor of the defendant Kenneth Pflug.

The plaintiff alleged negligence on the part of Kenneth Pflug, driver of the car in which plaintiff rode, in operating his car at a speed greater than was reasonable and proper taking into consideration the condition of the highway and the circumstances at the time and place, and also in the failure to keep a proper lookout and to have his automobile under proper control; and alleged negligence on the part of the driver of the bus in that the bus, a grey-colored vehicle, was parked with all four wheels upon the paved portion of the highway in the

nighttime and without display of any lights or warnings. Plaintiff alleged that the negligence of the two defendants concurred to cause his injuries.

The defendants answered separately. Each denied negligence and, without any specific allegation of contributory negligence, made the general allegation that any injuries sustained by plaintiff were due to his own carelessness and negligence. The reply was a general denial, and upon these issues the case went to trial. The defendant Rapid Transit Lines is the sole appellant here.

The appellant, on the submission of the case by oral argument, undertook to present for the consideration of the court an alleged error of the trial court in sustaining an objection to an offer of proof on the part of appellant. It was at the time asserted on behalf of the appellee that this question was not assigned in the motion for a new trial. It was not specifically assigned therein, and whether any of the more general assignments might be construed to cover it we do not need to inquire at this time for the reason that this particular error is not included in the assignments of error in the brief, nor in any wise discussed therein. The court cannot be expected to search the record to determine questions not raised according to the well-established procedure in this court, and that matter will not be further considered.

The assignments of error on this appeal are (1) that the court erred in overruling the motion of appellant for a directed verdict, and (2) that the court erred in failing to instruct the jury that it was the duty of plaintiff in looking out for his own safety to protest against the driving of defendant Pflug at such a speed that he could not stop to avoid hitting objects on the highway within the radius of his lights.

Upon the first proposition it is sufficient to say that, as to the actual conditions at the time and place of the accident, the testimony is sharply and hopelessly in conflict. The four witnesses who were in the car in which plaintiff rode all testify to the effect that the night was

rather chilly, the weather was misty so that moisture gathered on the windshield, and there was considerable fog, especially in the lower places, which obstructed the vision, it being so damp that the windshield wiper on the driver's side was working all the time. They further testify that the appellant's bus was parked or stopped on the paved portion of the highway, which was 18 feet in width, without lights; that it was painted in yellow and black, and that it was considerably covered with mud so as to render it almost invisible without lights; and that, although the lights of the automobile cast their beams some 35 feet ahead, yet they were not able to see the bus until within approximately 10 feet of it, at which time the driver undertook to cut off to his left, the car was sideswiped and the plaintiff's arm injured. Plaintiff was riding in the front seat and on the right of the driver.

The testimony of the defendant's two witnesses was to the effect that the bus was not stopped, but that with a disabled engine it was moving at approximately 15 miles an hour, the lights were on, the night was not foggy or misty and the pavement was dry.

In this state of the testimony it is plainly apparent that the court would not have been justified in directing a verdict.

Upon the second proposition, as to the failure to instruct the jury concerning the duty of a guest passenger to keep a lookout and to either warn the driver or protest concerning his driving, the trial court might well have been more definite in its instructions as to the rules of the road and as to the violations thereof or other acts proper to be considered as evidence of negligence. In this respect, however, the court was fully as definite in its instructions as the parties had been in their pleadings. The instructions given properly covered the general features of the case with definitions of negligence in its different degrees and the other terms used, and, as stated, might have well been more specific in reference to some features; but the complaint here on this appeal is par-

ticularly and only as to the lack of more definite instructions concerning the duty of the plaintiff as a passenger to protest against the speed of the driver, Kenneth Pflug. This criticism may be answered in two ways: First, that the evidence tends to show that it was a misty, foggy night, the fog being heavier in the lower places; that the windshield wiper was operating in front of the driver; that there was none in front of the plaintiff on his side; that there was no way in which the plaintiff could see as well as the driver on account of his vision being obstructed, and, under the circumstances as shown, anything that came or could have come within his knowledge or observation, was better and more clearly within the knowledge and observation of the driver. The speed of the car, as estimated, varies from 20 to 30 miles an hour and the court could hardly do more than say to the jury, which it did, that it was for them to say whether under the circumstances then and there existing such speed was negligent. It seems obvious that with better opportunity existing for observation and the like with the driver, and plaintiff's opportunities in that regard being much limited, there would be no occasion to instruct the jury as to any warning that plaintiff should have given. In addition, it should not be overlooked that, according to defendant's theory of the case, there was no mist, no fog, and no wet pavement. In such circumstances there would be no occasion for any one to be concerned about the visibility of things or a speed of 20 to 30 miles an hour at that time on the paved highway, and the testimony does not disclose a situation wherein the plaintiff might reasonably have been expected or required to protest or to warn the driver.

The assignment of error might also have greater weight were it not for the fact that by the verdict of the jury the defendant Pflug has been exonerated of negligence. The jury evidently took the view that the plaintiff had established his case and that the operator of defendant's

bus was negligent in stopping the same at night, under the circumstances then existing, on the 18-foot strip of paved highway and without lights. We cannot say that the jury were wrong and, in that view of the evidence, the finding against the appellant was fully justified. It is possible that, before the submission of the case to the jury, its aspect would have warranted some further instruction than was given as to the duties of a guest passenger, but such omission must now be regarded, if erroneous, as harmless error, because the jury have found that there was no negligence of the defendant Pflug, as to which the plaintiff himself would have been under duty to protest.

In this view of the record, we do not believe it necessary to undertake a discussion of the cases cited in the briefs or the particular distinctions to be made between them. They are the rules applied to the particular facts of the respective cases. Our statute provides that all questions of negligence are for the jury. Comp. St. 1929, sec. 20-1151. This is all inclusive except as to such instances where the court can say as a matter of law that no negligence has been established as against some certain party. The rule seems to be well-settled in this state that it is not the province of the court to tell the jury in its instructions that a certain thing is negligence if found in that case, but may refer to matters which find support in the evidence and advise the jury that those things may or should be considered by the jury in determining the fact of negligence. The court finds no occasion to recede from the rule announced in *Roth v. Blomquist,* 117 Neb. 444, and considers the propositions in this case more closely covered by the cases of *Giles v. Welsh,* 122 Neb. 164; *Johnson v. Mallory,* 123 Neb. 706; *Monasmith v. Cosden Oil Co.,* 124 Neb. 327, and *Adamek v. Tilford,* 125 Neb. 139.

Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

JOHN MISCHO, APPELLEE, V. HENRY VON DOHREN, APPELLANT.

FILED FEBRUARY 16, 1934. No. 28792.

1. Instructions examined and the giving thereof *held* not prejudicial to appellant.
2. Evidence. The admission in evidence of the Carlisle table of expectancy, and the references in testimony to liability insurance carried by defendant, *held* to be without error.
3. Damages. Verdict *held* not to be excessive.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

Votava & McGroarty, for appellant.

Paul I. Manhart, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

BLACKLEDGE, District Judge.

This action is to recover for personal injuries alleged to have been sustained by plaintiff, a pedestrian, who, in crossing St. Mary's Avenue in Omaha at its intersection with Leavenworth street, on November 30, 1931, was struck by an automobile driven by defendant. The plaintiff claims to have suffered injuries principally to his head and the lower region of his back. The case was tried in December, 1932, and the jury awarded him a recovery in the sum of $1,900.

The defendant, appellant, complains (1) that the court erred in submitting to the jury by instruction No. 15 the question of the permanency of plaintiff's injuries and, incident thereto, in admitting in evidence the Carlisle table of expectancy; (2) that there was error in the giving of instruction No. 11 on the subject of comparative negligence; (3) that the verdict is excessive; and (4) that there was misconduct of counsel in proving that the defendant carried insurance.

There was testimony tending to show that the plaintiff

was a farmer, 54 years of age, and prior to the accident in good health, weighing 196 pounds, and doing his own work on his farm of 117 acres; that the blow by which he was injured threw him approximately eight feet from the automobile to the pavement; that he was under medical observation and treatment from that time until the following June, after which he received home treatment. He was examined and treated by two physicians. X-rays were taken. He was reexamined in June, 1932, and again in December shortly before the trial. He constantly complained of pain in his head and back and of soreness and inability to bend the body or stoop, and so continued up to the time of trial. He lost from 25 to 27 pounds in weight and became nervous and much depressed, occasionally giving way to spells of crying. He did not, and claimed he could not, do any of the heavier farm work, and worried much concerning his condition. The physicians, three in number, stated that they had found no organic basis for the complaint of pain, no bones, muscles or ligaments broken, torn or misplaced, no satisfactory reason or explanation why there was not a reasonably prompt and full recovery or why he should now complain of pain, and doubted whether there was any permanent injury "from the physical examination standpoint." There was further testimony by his wife and son and sister-in-law who had all been in contact with him and had part in his care throughout the period. There is neither statement nor intimation that he was consciously or intentionally faking injury or pain.

The foregoing is a brief outline of the import of the testimony covering that feature of the case from the bill of exceptions, consisting of a total of 213 pages, upon consideration of which we find adequate basis for the submission by the court to the jury of the question of permanency, to the extent to which it was actually submitted. The part of the instruction criticized is herein italicized:

"If you find from the evidence that the plaintiff is entitled to recover in this case, it will be necessary for you

to determine the amount of damages he has sustained as the direct and proximate result of the accident, *and in arriving at these damages, if any the plaintiff has sustained, you will take into your consideration the character and extent of the injuries, if any, whether the same are permanent and will continue to exist in the future to the fullest extent, or only partially, or whether his injuries were only transient and ones from which he will recover.*

"You will also take into consideration any pain and suffering which was the direct result of the accident, and such expenses as were incurred for medical attention as shown by the evidence, and award him such damages, but only such as will fairly compensate him, or make him whole.

"You are not permitted to allow the plaintiff any damages by way of punishment or through sympathy, or any prejudice against either of the parties, as the law recognizes only compensatory damages, that is, such damages as will fairly make the plaintiff whole for the injuries which he has sustained."

It will be noted that the court did not authorize recovery for future pain and suffering, nor for expenses except medical attention; but only for that "which was the direct result of the accident," and "for the injuries which he has sustained."

In the case cited by appellant, *Lowe v. Armour Packing Co.*, 148 Minn. 464, the injured person was taken to a hospital and received first aid, the next day called a physician who found a bruise on the forehead, two teeth loosened, a bruise on her right knee, and one on her hip. She complained of pain, nervousness, and inability to sleep. The doctor gave her a sedative and a lotion with which to bathe the knee. He called once or twice afterwards and communicated with her a few times by telephone. From an examination before the trial, two physicians testified that in their opinion plaintiff had suffered no structural, functional or permanent injuries and that no abnormal condition then existed. There is not shown to have been

other testimony to this phase of the case than that of plaintiff and the two physicians. The court did not grant a new trial but required the recovery of $2,500 to be reduced to $1,500.

In another case cited by appellant, *McGowan v. Dresher Bros.*, 106 Neb. 374, the objection was upon the submission to the jury of the question of the permanency of the injury. The case rested upon the statements of plaintiff as to how his injured foot affected him and of two physicians called by defendant who testified to the complete healing of the fracture, leaving all bones of the foot in normal size, shape, and position, and no indication of anything in the bones, nerves or muscles that would cause a disability. The court holds that the question of permanent diability should not have been submitted to the jury, but plaintiff, having sustained a severe injury and having been incapacitated for several months, and previously earning $110 a month, was entitled to substantial damages. It further held, however, that the amount of $3,500 was probably enhanced somewhat by a speculative view of a permanently disabled foot and required the plaintiff to remit $1,000 therefrom, leaving the judgment to stand at $2,500.

As is said in the opinion in that case, so in this one, we cannot find that the verdict was the result of passion and prejudice. When we pause to realize that plaintiff was unexpectedly struck in the region of the lower back by an unyielding weight of more than a ton, moving at a speed, as the defendant himself states, of from 12 to 15 miles an hour and that he was thereby incapacitated for several months, it requires no imagination to conclude that he sustained substantial injuries. The verdict in this case of $1,900 does not indicate an enhancement by a speculative view of the result, nor appear to be more than adequate compensation for the injury and suffering already sustained.

It follows from these observations that the complaint as to instruction No. 15 must be overruled, the admission of

the Carlisle table in evidence was not prejudicial, and the amount of the verdict is not found to be excessive.

Upon the objection raised to the language of instruction No. 11, as to comparative negligence, that particular language has been many times approved by this court and, although criticized in a recent case and doubtless susceptible to improvement, we do not think the use thereof was prejudicial or could have misled the jury in this case. We are inclined to hold with the syllabus in *Kelso v. Seward County,* 117 Neb. 136: "When an instruction is substantially correct, a case will not be reversed because it is possible to improve the phraseology thereof."

The record does not disclose any wilful or undue overstepping of proper bounds in the references during the trial of the matter of insurance carried by defendant. The trial court has a reasonable discretion therein, and properly instructed the jury thereon. This assignment must, therefore, under the well-established rule of this court, be overruled.

Having examined all the errors assigned on this appeal and finding nothing prejudicial to appellant therein, the judgment of the district court is

AFFIRMED.

JOHN J. WILSON, TRUSTEE, APPELLANT, V. NEBRASKA STATE BANK, APPELLEE.

FILED FEBRUARY 16, 1934. No. 28620.

1. **Bankruptcy**: "GOING CONCERN." An insolvent manufacturing corporation which has sold its factory building, grounds and part of its machinery, for the purpose of liquidating its affairs, is no longer a "going concern."
2. ———: "DEPOSIT." A deposit in a bank, by an insolvent manufacturing corporation which has ceased to be a "going concern," of the proceeds from the sale of its factory building, grounds and a part of its machinery is not a deposit made "in the ordinary course of business" of the insolvent.

3. ———: "SET-OFF." To entitle a bank of deposit, which is also a creditor, to set off a checking account of the insolvent debtor against a note of the insolvent owned by the bank, under section 68a of the United States bankruptcy act, such deposit must have been made "in the ordinary course of business" of the insolvent.
4. ———: PREFERENCES. Where an insolvent manufacturing company, with the advice and approval of the officers of its bank of deposit, which was also a creditor, has sold its factory building, grounds and a part of its machinery for the purpose of liquidating its affairs, the act of said bank in appropriating the deposit as a set-off to its claim against the insolvent within four months prior to the filing of a petition in bankruptcy is voidable at the suit of the trustee of the bankrupt estate, under section 60a of the United States bankruptcy act, as an unlawful preference over other creditors of the same class.
5. ———: ———. *Held*, under the evidence in this case, the defendant bank was not entitled to set off the checking account of the bankrupt against the note of the bankrupt owned by the defendant bank, and that, by so doing, the defendant bank received a preference over other creditors of the same class voidable at the suit of the trustee of the bankrupt estate.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed, with directions.*

Burkett, Wilson, Brown, Wilson & Van Kirk and *George E. Hager*, for appellant.

Beghtol & Foe and *J. Lee Rankin, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

HORTH, District Judge.

On March 29, 1928, an involuntary petition in bankruptcy was filed in the district court of the United States for the district of Nebraska, Lincoln division, against the Lincoln Box and Manufacturing Company, hereinafter called the company, and on April 19, 1928, the company was adjudged a bankrupt, and by this action the trustee of the bankrupt estate, hereinafter called the plaintiff, seeks to recover from the Nebraska State Bank of Lincoln, Ne-

braska, hereinafter called the defendant, the sum of $9,745.93, with interest thereon, which amount the defendant on February 21, 1928, charged to the checking account of the company and credited on the $16,250 demand note of the company owned by defendant; plaintiff asserting that the defendant thereby received a preference in payment over other creditors of the same class of the bankrupt, under the provisions of the bankruptcy laws of the United States. The defendant answering, admitted the filing of the petition in bankruptcy against the company, that the company was adjudged a bankrupt, and that plaintiff was elected and appointed trustee of the bankrupt estate; denied all other allegations of plaintiff's petition; and as an affirmative defense pleaded the right to set off the amount of the company's deposit against the company's note owned by it.

The cause came on for trial in the district court and, when all the evidence had been presented, each party moved for an instructed verdict. The trial court discharged the jury, found that the act of the defendant in setting off the company's deposit against the note owing to the defendant by the company did not constitute a preference under the bankruptcy law, and further found, generally, in favor of the defendant and dismissed plaintiff's petition. Plaintiff's motion for a new trial having been overruled, plaintiff appeals, urging that the trial court erred in refusing to enter judgment in favor of the plaintiff and in dismissing plaintiff's action.

It appears from the evidence that for several years prior to February 20, 1928, the company had been engaged in a general woodwork and box manufacturing business in the city of Lincoln, owning its own factory building, the machinery necessary for the conduct of its business, and the grounds occupied by the factory building; that during all of said years the company had borrowed money from and had maintained a checking account with the defendant; that on February 20, 1928, the company, with the knowledge, advice and approval of the managing officers

of the defendant, sold its real estate together with the factory building situated thereon and a portion of its machinery for the sum of $9,908.04, and deposited the check representing the sale price in its checking account with the defendant; stored the unsold portion of its machinery and ceased to do any manufacturing business. In the morning of February 21, 1928, the defendant charged the company's checking account with the sum of $9,745.93 and credited said amount on the $16,250 demand note of the company.

Two major questions present themselves for determination, namely: (1) Did the defendant, under the facts in this case, have the right of set-off under the provisions of section 68 of the United States bankruptcy act; and (2) did the defendant receive a preference over other creditors of the same class, voidable at the instance of the plaintiff, under the provisions of sections 60a and 60b of said bankruptcy act?

1. Section 68 of the United States bankruptcy act provides:

"a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

"b. A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy." 30 U. S. St. at Large, ch. 541, p. 565.

In 1904 the supreme court of the United States, in interpreting section 68a of the bankruptcy act, in *New York County Nat. Bank v. Massey,* 48 L. Ed. 380 (192 U. S. 138) said:

"Insolvents, by depositing money in a bank upon an open account, subject to check, do not thereby make a

transfer of property amounting to a preference, which, under the bankruptcy act of 1898 (30 Stat. at L. 562, U. S. Comp. Stat. 1901, p. 3445), sec. 60a, will deprive the bank of its right under section 68a to set off the amount of such deposit remaining to the depositors' credit on the date of their adjudication in bankruptcy and to prove its claim against the bankrupt estate for the balance."

In 1913 the court again had the question under consideration in *Studley v. Boylston Nat. Bank,* 57 L. Ed. 1313 (229 U. S. 523) and the court there said:

"The enforcement by a bank of its lien or right of set-off by applying deposits, honestly made *in due course of business,* and without intent to prefer the bank, to the payment of the depositor's notes in the bank's favor as they matured, does not, though within four months of the bankruptcy proceedings against such depositor, constitute a preference forbidden by the act of July 1, 1898, there being nothing in section 68a of that act which prevents the parties from voluntarily doing before the petition is filed what that section itself requires to be done after the proceedings in bankruptcy are instituted." (The italics are ours.)

It will be observed, in the *Studley* case, the court limits a bank's right of set-off to deposits made by the insolvent *in due course of business.* The following inquiry, therefore, suggests itself: Was the deposit of $9,908.04, representing the sale price of the company's factory building, grounds and a part of its machinery, made in due course of business?

In *Walbrun v. Babbitt,* 83 U. S. 577, Mendelson, a retail merchant of a miscellaneous stock of goods, was insolvent and sold his stock of merchandise in bulk to one person. The court said:

"The 35th section of the bankrupt law condemns fraudulent sales equally with fraudulent preferences, and declares that if said sales are not *made in the usual and ordinary course of business of the debtor* that fact shall be *prima facie* evidence of fraud. The usual and ordinary

course of Mendelson's business was to sell at retail. * * * It was to conduct a business of this character that the goods were sold to him and, as long as he pursued the course of a retailer, his creditors could not reach the property disposed of by him, even if his purpose at the time were to defraud them. But it is wholly different when he sells his entire stock to one or more persons. This is an unusual occurrence, out of the ordinary mode of transacting such a business."

As a going concern, the business of the company was the manufacture and sale of boxes and woodwork, and as incidents thereto the company borrowed money from the defendant upon its promissory notes, contracted indebtedness for materials purchased from others, maintained a checking account with the defendant and, as funds were received by the company, they were deposited in its checking account with the defendant. Such deposits were deposits made in the ordinary course of business. After the company disposed of its factory building, grounds and a part of its machinery and removed and stored the unsold portion, its usual course of business was thereby interrupted. It was incapacitated from conducting the corporate enterprise in which it had been engaged. It was insolvent and unable to extricate itself from its financial difficulties. It had ceased to be a "going concern," and at this stage in the company's history the deposit in controversy was made.

In *Oliver v. Lansing*, 59 Neb. 219, Justice Norval, in writing the opinion, said: "A 'going concern' is, as we understand it, some enterprise which is being carried on as a whole, and with some particular object in view."

In *White, Potter & Page Mfg. Co. v. Pettes Importing Co.*, 30 Fed. 864, in defining the term "going concern" as applied to a corporation, the court said that it means that it continues to transact its ordinary business.

In *American Woodworking Machinery Co. v. Agelasto*, 136 Fed. 399, defining when a manufacturing plant is a "going concern," the circuit court of appeals, fourth cir-

cuit, said: "Our opinion is that the site, the structure, the motive power, and the machinery, whether the last be movable or immovable, combine to constitute the manufacturing plant, and the operations as manufacturer cannot begin until the plant is thus complete, or, in common parlance, until the plant is a 'going concern.'"

If, at the time of making the deposit of February 20, 1928, the company was not a going concern, then the deposit was not made in the ordinary course of business of the company.

In *Merrimack Nat. Bank v. Bailey*, 289 Fed. 468, the circuit court of appeals of the United States for the first circuit held: "Where the business of an insolvent was being liquidated by its creditors, its business being shut down, and the proceeds of liquidation were deposited in various banks, with an agreement and understanding as to the *pro rata* distribution among the creditors generally, the action of a bank of deposit, which was also a creditor, in appropriating the deposit as a set-off to its claim against the insolvent, was void, under the bankruptcy act, section 60a (Comp. St. sec. 9644), as an unlawful preference, and not within the rule that, where a deposit is made in good faith and *in the usual course of business* within four months before the petition in bankruptcy, the bank is allowed to credit the amount on notes of the bankrupt held by it." In the body of the opinion it is said: "We recognize, of course, the soundness of the rule stated in such cases as *American Bank & Trust Co. v. Coppard*, 227 Fed. 597, 142 C. C. A. 229, that: 'When an insolvent customer makes a deposit in his bank, in good faith and *in the usual course of business,* at any time within four months before the petition in bankruptcy is filed against him the bank is allowed to credit the amount on notes of the bankrupt held by it.' (Italics ours.) But in this case the deposits were not made 'in the usual course of business.' There was no 'usual course of business' after November 1. The insolvent's business was then shut down; it was being liquidated by its creditors; naturally enough, the proceeds of

liquidation were deposited in various creditor banks. *The understanding that no preferences should be given was, in effect, nothing but a recognition of the requirements of the law.*" (Italics ours.)

In 263 U. S. 704, certiorari in the *Merrimack Nat. Bank* case was denied.

In *Gates v. First Nat. Bank of Richmond,* 1 Fed. (2d) 820, it is said: "Where vice-president of bank, who was chairman of creditors' committee, knew that debtor could not continue business unless creditors extended time for payment of debts, that creditors had not agreed to moratorium, and that debtor had suspended operations before it made deposits in bank, the bank had reasonable cause to believe, when it charged such deposits to the debtor's indebtedness in bank, that effect thereof would be to give it a preference." In the body of the opinion it is said: "The company was not, it is true, being operated by its creditors' committee; therefore the deposits in the bank were made by the company itself, rather than as in the *Merrimack* case. But the deposits were made after the suspension of operations, and the bank knew this. So I do not think the deposits were made in the ordinary course of business."

In *Union Bank & Trust Co. v. Loble,* 20 Fed. (2d) 124, the circuit court of appeals of the ninth circuit said: "Where bank, with knowledge of bankrupt's failing circumstances, suggested that bankrupt conduct a special sale to raise money to pay certain creditors, with a view to reorganizing and continuing the business, the fund realized on such sale and deposited in the bank *held* impressed with character of trust fund, so as to exempt it from bank's claim to right of set-off against debt owing it from bankrupt."

We conclude that the deposit by the company on February 20, 1928, was not made in the due course of business, that the defendant was not entitled to set off such deposit, or any part thereof, against the indebtedness due it from the company, and the act of the defendant in crediting

$9,745.93 of such deposit upon the note of the company was a "transfer" within the meaning of the bankruptcy act.

2. Did the defendant receive a preference, voidable at the instance of the plaintiff, under the provisions of sections 60a and 60b of the bankruptcy act?

We quote so much of sections 60a and 60b as is necessary to the discussion of the question under consideration:

Section 60a. "A person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." 32 U. S. St. at Large, ch. 487, p. 799.

Section 60b. "If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of the transfer, * * * the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." 36 U. S. St. at Large, ch. 412, p. 842.

In *Emporia Loan & Investment Co. v. Rees,* 66 Fed. (2d) 225, the circuit court of appeals of the tenth circuit hold:

" 'Voidable preference' within bankruptcy law implies intent or willingness on creditor's part to deplete insolvent fund in order to obtain satisfaction in whole or in part of claim."

The burden of proof rested upon the plaintiff to establish by a fair preponderance of the evidence: (1) A transfer of the company's property to the defendant within four months prior to the filing of the petition in bankruptcy; (2) that the company was insolvent at the time of the transfer; (3) that the enforcement of the

transfer would enable the defendant to secure a greater percentage of its claim than other creditors of the same class; and (4) that the defendant knew this or had reasonable cause to believe it.

(1) and (2) of the above requirements may be disposed of by the statement that it satisfactorily appears from the evidence and admissions of the defendant that the transfer of the $9,745.93 from the checking account of the company to the defendant was made February 21, 1928, that the company was insolvent at that time, and that the petition in bankruptcy was filed March 29, 1928.

Does the evidence show the enforcement of the transfer (meaning a finding that the act of the defendant in appropriating the company's deposit was not a voidable preference) would enable the defendant to secure a greater percentage of its claim than other creditors of the same class?

The record and evidence disclose that on February 20, 1928, the company's assets amounted to approximately 60 per cent. of its liabilities; that by appropriating the company's deposit the defendant received a sum approximating 60 per cent. of its entire claim, and that other creditors of the same class have received nothing upon their claims. Such evidence as there is tends to show that on February 21, 1928, the remaining assets of the company, consisting of a broken stock of merchandise, detached parts of machinery, office equipment, all in storage, and books of account were of the value of $6,200. Deducting the $9,745.93 received by the defendant, the company's liabilities remained about $15,700 made up of the $6,545, the balance of defendant's claim, and about $9,155 due to other creditors of the same class. Assuming that the remaining assets of the company produce $6,200, it would mean a dividend to all creditors of approximately 40 per cent. upon such remaining liabilities.

If, *at the time,* the defendant appropriated the checking account of the company, its act in so doing was lawful, and did not constitute a voidable preference, it carried

with it, as a part of the same transaction, the right to the defendant to share, *pro rata,* with other creditors of the same class, in the distribution of the remaining assets of the bankrupt, and thus in the final analysis the defendant would have received approximately 77 per cent. of its entire claim, while other creditors of the same class would receive only about 40 per cent. of their respective claims. It necessarily follows that the validation of the act of the defendant, in appropriating the company's deposit, would secure to the defendant a greater percentage of its claim than other creditors of the same class.

In *Commerce-Guardian Trust & Savings Bank v. Devlin,* 6 Fed. (2d) 518, it is said: "Though bankrupt's liabilities were about twice amount of assets, a creditor who was paid 48 per cent. of its claim shortly before bankruptcy received a preference, since if preference were upheld, creditor could still claim balance of debt and share with others in distribution." In the body of the opinion it is said: "We see no merit in the suggestion that the bank got no greater percentage on its own claim (about 48 per cent.) than creditors generally would have had, if we accept the estimate of 50 per cent. made by the bankrupt's bookkeeper. The bank actually received 100 per cent. on $6,300 of its claim, and, if the preferences were upheld, would be entitled to receive upon the balance of its claim the same percentage as other creditors of the same class."

In *Armour & Co. v. Callahan,* 25 Fed. (2d) 584, the circuit court of appeals of the fourth circuit said: "Creditor of a bankrupt corporation may not, on eve of bankruptcy, take possession of assets of the estate * * * and thereby virtually secure a part payment of his claim."

Did the defendant know, or have reasonable cause to believe, the enforcement of the preference it received, by appropriating the company's deposit, would enable it to receive a greater percentage of its claim than other creditors of the same class?

Mr. Charles Thornberry, a witness, testified he was president and manager of the Lincoln Box and Manufac-

turing Company at the time it quit the business of manufacturing and selling goods, and so on, *in February,* 1928, and had been such president and manager for three or four years; that on February 20, 1928, he sold the real estate, building and some of the equipment of the company; that he told both Beaumont and Coe, he thinks, to deposit proceeds of sale in the bank together with whatever he could collect and build up a fund for the benefit of creditors.

Mr. F. M. Beaumont, another witness, testified that from 1911 to July, 1928, he was an officer of the defendant bank—vice-president for a number of years—then cashier for a number of years; that he knew of the financial difficulties of the Cushman Motor Company, that the Lincoln Box and Manufacturing Company was then a subsidiary corporation of Mr. Sawyer in connection with the Cushman Motor Company; that the Lincoln Box and Manufacturing Company was then indebted to the defendant bank; that we insisted that this loan be cut down, it was an excessive loan; that it was in financial difficulties; that from that time on the defendant tried to keep pretty close supervision over the business matters of the Lincoln Box and Manufacturing Company; that as an officer of the bank during those years he consulted with Mr. Thornberry frequently in reference to the matters; that Mr. Coe, also an officer of the Nebraska State Bank during those years, was in constant consultation with Mr. Thornberry with reference to the business; that the matter of the sale of the property was discussed on a number of occasions prior to the time the actual sale was made; we allowed him to go ahead and pay off small outstanding foreign accounts; we gave our consent for him to issue checks to do that; had several talks with Mr. Thornberry at the bank with reference to a sale of the property; and on one or two occasions at the factory; we wanted to get the line reduced and were anxious to have a sale; Mr. Coe and Thornberry discussed the matter several times in my presence; that we would never have given our consent

that the amount received for the plant would be applied on the liquidation of the indebtedness of the corporation, as we held the stock as collateral for our notes we didn't think he had a right to sell the property and leave us sitting high and dry; I don't recall the date of the sale, I do know that Mr. Thornberry came in after the regular banking hours and the tellers were all out of their cages at that time and I was in my office, and Mr. Thornberry says, I want to make a deposit, and I personally handed him a deposit slip and he filled it out and took credit for it; I consulted with Mr. Coe that night or the next morning with reference to the deposit and what should be done with it; consulted with attorney Stout about the matter; we turned down some checks he had issued on the deposit and we simply told Mr. Thornberry we had applied the money on his indebtedness; he said he would have to pay the taxes, he had given a check to the county treasurer for the taxes and if the check was not paid it might upset the deal, so we paid that check to the county treasurer; do not recall that Thornberry contended that I had promised if this sale went through the money would be applied in liquidation of indebtedness, we would never have promised anything like that, we felt that we had the first right to that money over everybody else.

In *Schoenbrod v. Central Trust Co.*, 238 Fed. 775, the circuit court of appeals of the seventh circuit held: "Under Bankr. Act July 1, 1898, c. 541, sec. 60b, 30 Stat. 562 (Comp. St. 1913, sec. 9644), making void a transfer within four months before the filing of the petition in bankruptcy, if the bankrupt was then insolvent, and the transfer operated as a preference, and the person receiving it had reasonable cause to believe that it would effect a preference, it is not necessary that the creditor actually knew that the debtor was insolvent, but the preference is void if he had information sufficient to have put an ordinary business man on inquiry as to facts which would show insolvency, and his failure to make such inquiry is no excuse."

In *In re Putterman,* 46 Fed. (2d) 175, the court said: "Bank receiving deposits to apply on debts, knowing that bankrupt was insolvent, had reason to believe that the act created preference of itself."

In *Mechanics & Metals Nat. Bank v. Ernst,* 58 L. Ed. 121 (231 U. S. 60) the court said: "Deposits made by an insolvent customer after the bank cashier has forbidden the payment of checks against the deposit account, and but a few hours before an involuntary petition in bankruptcy was filed against the customer, constitute a voidable preference, and cannot be allowed to the bank by way of set-off against the customer's indebtedness to the bank."

From all the facts and circumstances proved, and the natural and reasonable inferences to be drawn from the close supervision maintained by the officers of the defendant over the affairs of the company, and their opportunity and duty to learn its financial condition, the conclusion is inevitable that such officers not only had reasonable cause to believe, but knew, the enforcement of the preference the defendant received by appropriating the company's deposit would enable it to receive a greater percentage of its claim than did other creditors of the same class, and that in appropriating such deposit the officers of the defendant were acting upon such knowledge and belief.

This is not a trial *de novo,* but an inquiry to ascertain whether the findings and judgment of the trial court are supported by sufficient competent evidence, and if we find they are not so supported, after giving to such findings and judgment the presumptions to which they are entitled under the decisions of this court, then to ascertain whether the plaintiff sustained the burden of proof upon all questions necessary to have entitled him to recover upon the trial of this action. Our findings are that the findings and judgment of the trial court are not supported by sufficient competent evidence and that the plaintiff did sustain the necessary burden of proof to entitle him to recover.

In reaching these conclusions, we have given consideration to the cases of *Peck & Co. v. Whitmer,* 231 Fed. 893,

Mansfield Lumber Co. v. Sternberg, 38 Fed. (2d) 614, and *Latrobe v. Cross Co.*, 29 Fed. (2d) 210, cited by counsel for defendant. The proposition that, if a transfer or preference is enforced, the creditor receiving the same will be entitled to share *pro rata* with other creditors of the same class in the distribution of the remaining assets of the bankrupt estate, to the extent of the balance due such creditor, was either not an issue, or, if an issue, it was not passed upon in those cases, and therefore they are not helpful in determining this case.

It follows that the trial court erred in not entering judgment in favor of the plaintiff for $9,745.93, together with interest thereon at the rate of 7 per cent. per annum from the date the petition was filed herein. *Plymouth County Trust Co. v. MacDonald*, 60 Fed. (2d) 94.

The judgment of the district court is reversed, with instructions to enter judgment in favor of the plaintiff for $9,745.93, together with interest thereon at 7 per cent. per annum from the filing of the petition herein.

REVERSED.

IN RE ESTATE OF JOHN O'CONNOR. ADAMS COUNTY, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED FEBRUARY 16, 1934. No. 28640.

1. **Escheat.** By "escheat" is meant the lapsing or reverting to the state as the original and ultimate proprietor of real estate, by reason of a failure of persons legally entitled to hold the same.
2. **Property.** What is commonly termed ownership of real estate is in fact tenancy, whose continuance is contingent upon legally recognized right of tenure, transfer, and of succession in use and occupancy.
3. **Escheat.** When the tenancy of ownership expires or is exhausted by reason of the failure of the law or the state to recognize any person or persons in whom such tenancy can be continued, then the real estate reverts to and falls back

upon its original and ultimate proprietor, or, in other words, escheats to the state.

4. ———. When there is a failure of heirs, the title to real estate vests immediately or at once in the state.

5. ———. In the case of failure of heirs, the state does not take as a successor under the laws of descent and distribution, but as a reversioner.

6. Taxation. When the state takes real estate on account of failure of heirs or by "escheat," such estate is not subject to an inheritance tax, since inheritance tax is assessed upon succession and not upon reversion.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed and dismissed.*

Paul F. Good, Attorney General and *William H. Wright,* for appellant.

Herman G. Schroeder, contra.

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

YEAGER, District Judge.

This is an appeal by the state of Nebraska from the judgment of the district court for Adams county, Nebraska, in which county the estate of John O'Connor was probated. The estate escheated to the state of Nebraska for want of heirs. The county of Adams contends that the state is liable for the payment of an inheritance tax. This is the only question in the case. The county of Adams was successful in the action in district court and the state of Nebraska has appealed to this court.

It appears that this case must be determined on the true meaning of the term "escheat." In early England or during the feudal period, escheat meant the falling back or reversion of lands to the lord of the fee upon the failure of heirs capable of inheritance under the original grant. In both England and the United States now, by escheat is meant the lapsing or reverting to the crown or the state as the original and ultimate proprietor of real

estate, by reason of a failure of persons legally entitled to hold the same.

Clearly the theory of the law in the United States, then, is that first and originally the state was the proprietor of all real property and last and ultimately will be its proprietor, and what is commonly termed ownership is in fact but tenancy, whose continuance is contingent upon legally recognized rights of tenure, transfer, and of succession in use and occupancy. When this tenancy expires or is exhausted by reason of the failure of the state or the law to recognize any person or persons in whom such tenancy can be continued, then the real estate reverts to and falls back upon its original and ultimate proprietor, or, in other words, escheats to the state.

This state has never departed from the accepted meaning and interpretation of escheat in the United States. In our first Constitution (Const. 1866, art. VI, sec. 3) it was provided: "All lands, the title to which shall fail from defect of heirs, shall revert or escheat to the people." This provision is no longer to be found in our Constitution, but in section 3, art. VII, escheat is recognized. Though the above quoted provision has been taken out of the Constitution, it has never been removed from the statutes, where it has remained unchanged since 1875. Section 76-501, Comp. St. 1929, being the provision referred to, is as follows: "Upon failure of heirs the title shall vest at once in the state, without an inquest or other proceedings in the nature of office found." It then becomes apparent that in this state by "escheat" is meant a reversion of title to the state upon failure of heirs.

Section 6622, Rev. St. 1913, contained the law providing for taxes upon inheritances. On account of its length we will not quote it here, but an analysis of its provisions clearly shows that what was intended was a tax upon a right of succession to property by inheritance, will, or by transfer made in contemplation of death, which is clearly distinguishable from a reversion, which can only take place where the title holder dies without will, without

heirs, and without having made a transfer of the property in contemplation of death.

The appellee urges that, since escheat is mentioned in the seventh paragraph of the statutes providing the order and method of distribution of real estate in intestate estates (Comp. St. 1929, sec. 30-102), the legislature must therefore have intended to classify the state as a beneficiary. With this contention we cannot agree. The effect of such a theory would be the restriction and abridgement of the right of reversion which it had from earliest times, which right has been declared by Constitution and statute in such manner as to leave no doubt of the intention to retain it unimpaired. Escheat is one of the incidents of our state sovereignty and it cannot be surrendered unless the intention so to do is clearly and unequivocally expressed.

There are other questions suggested in the record of this case; but, since this one is decisive of the issue presented, no useful purpose would be served in their discussion. The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ANNA HARRISON, APPELLANT, V. CARGILL COMMISSION COMPANY, APPELLEE.

FILED FEBRUARY 21, 1934. No. 28986.

1. **Marriage.** In Nebraska a common-law marriage was recognized as valid prior to the act of 1923, requiring a public license and a solemnization by an authorized person. Comp. St. 1929, sec. 42-104.
2. **Master and Servant: WORKMEN'S COMPENSATION LAW: DEPENDENTS.** Under the workmen's compensation law, a wife living with her husband at the time of his death in an accident arising out of and in the course of his employment is conclusively presumed to be wholly dependent upon him for support. Comp. St. 1929, sec. 48-124.
3. ———: ———. The workmen's compensation law should be

liberally construed to give effect to its purposes.

4. ———: ———. "An outstanding purpose of the workmen's compensation law is to shift from the employee to modern industry the burden of economic waste or loss 'arising out of and in the course of his employment' as a result of his injury or death." *Tralle v. Hartman Furniture & Carpet Co.*, 116 Neb. 418.
5. **Husband and Wife.** Public support of a wife in an asylum for the insane does not release her husband from his legal obligation to support her.
6. **Master and Servant: WORKMEN'S COMPENSATION LAW: DEPENDENTS.** A wife who has not forfeited or otherwise lost any marital right may be "living" with her husband at the time of his death in an industrial accident, within the meaning of the workmen's compensation law, though then involuntarily confined in an asylum for the insane.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Reversed.*

Smith & Schall, Gerald M. Vasek and *Howell & Wright*, for appellant.

Gaines, McGilton, McLaughlin & Gaines, contra.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

ROSE, J.

This is a proceeding under the workmen's compensation law. William T. Harrison was employee and Cargill Commission Company, a corporation operating a grain elevator near Omaha, was employer. Employee was smothered in grain in his employer's elevator February 17, 1931, as the result of an industrial accident arising out of and in the course of his employment. Anna Harrison, an incompetent person, by her guardian, Harry Heinrickson, plaintiff, filed with the compensation commission a claim for compensation as the dependent widow of the deceased employee. The claim was allowed by the compensation commissioner, and the employer, defendant, appealed to the district court for Douglas county.

The defenses to the claim for compensation were that

claimant was not the widow of the employee, never having been his lawful wife; that they were not living together at the time of the employee's death, and that she was not then dependent upon him for support.

Upon a trial in the district court the award of the compensation commissioner was vacated and the proceeding dismissed. Claimant, plaintiff, appealed.

It is shown by a preponderance of the evidence that claimant became the common-law wife of the employee prior to the enactment of 1923, providing in effect:

"A valid marriage can be contracted in this state only when the parties have previously obtained a license to marry, and when the marriage has been solemnized by a person authorized by law to solemnize marriages." *Collins v. Hoag & Rollins,* 122 Neb. 805. Laws 1923, ch. 40, Comp. St. 1929, sec. 42-104.

This statute did not invalidate prior common-law marriages. They were previously recognized as valid. Claimant did not abandon her husband or seek a divorce or agree to a separation or forfeit her rights as a wife. The marriage relation between her and her husband was first severed when the latter lost his life in the service of his employer. In this view of the law she was his lawful wife.

Was claimant "living" with her husband at the time of his death within the meaning of the workmen's compensation law? Was she wholly dependent upon him for support? The answers to these questions depend on the law and the facts. The statute provides:

"The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (a) A wife upon a husband with whom she is living at the time of his death." Comp. St. 1929, sec. 48-124.

To avoid the payment of compensation, defendant, the employer, contends that claimant was not living with her husband at the time of his death, because she was then living apart from him in an asylum for the insane, where

she had been confined for years, and that she was not dependent upon him for support, because the public supported her where she was confined, without any aid whatever from her husband. These propositions are skilfully presented, but they rest on technical construction of statutory language or on literal legislative terms. It has often been held that the workmen's compensation law should be liberally construed to give effect to its purposes, one of them being:

"An outstanding purpose of the workmen's compensation law is to shift from the employee to modern industry the burden of economic waste or loss 'arising out of and in the course of his employment' as a result of his injury or death." *Tralle v. Hartman Furniture & Carpet Co.*, 116 Neb. 418.

This purpose would be defeated to some extent at least, if public support of a wife in an asylum would release her husband from his legal obligation to support her. By the use of the expression "with whom she is living," as it appears in the workmen's compensation law, the legislature did not intend to deny compensation to a widow who was dependent upon her husband for support, merely because she was temporarily absent from him at the time of his death, where there had been no estrangement, or divorce, or purpose to separate, or agreement to live apart, or wrong-doing, or violation of martial relations or duties. Without losing the right to the support of a husband, the wife, with his consent, may properly be away from home for long periods of time, when justified by circumstances. A faithful wife may retain her marital rights though involuntarily separated from her husband for a time. In such contingencies they are still "living together" in the sense contemplated by the legislature and in the common understanding of those words.

The duty of a husband to support his wife is imposed by law. *Acton v. Schoenauer*, 121 Neb. 62. Claimant was committed to a hospital for the insane January 19, 1929. By process of law she was detained there continuously

except at intervals when she was temporarily paroled to her husband. She was in the hospital at the time of his death, and was received there as employee's wife. Her husband maintained a home for her. To his home she had returned when paroled. She was permitted to attend his funeral. She was incapable mentally of agreeing to a separation or of waiving her rights as a wife. Insanity was not a ground for a divorce. If she had been restored to mental competency at any time, her place of abode would have been her husband's home, with her marital rights unimpaired, including support. The word "living" was not limited by the legislature to physical presence in the home, but extended to proper or unavoidable absences during the existence of the marriage relation. In this sense claimant was not only living with her husband, but he was morally and legally bound to support her at the time he was fatally injured in an industrial accident. She was then dependent upon him for support within the meaning of the workmen's compensation law. Mere violation of the duty of the husband to pay for the support of his wife, if she retains her right thereto, does not prevent recovery for compensation. *Parson v. Murphy,* 101 Neb. 542. These views have often been announced in no uncertain terms. In construing statutory provisions like those under consideration the supreme court of Wisconsin said:

"Proof of total dependency is dispensed with under the statute where the husband and wife are 'living together' at the time of the death of the injured employee. It seems, therefore, quite obvious that the legislature intended by the use of the words to include all cases where there is no legal or actual severance of the marital relation, though there may be physical separation of the parties by time and distance. The 'living together' contemplated by the statute, we think, was intended to cover cases where no break in the marriage relation existed, and therefore physical dwelling together is not necessary, in order to bring the parties within the words 'living together.' There

must be a legal separation or an actual separation in the nature of an estrangement, else there is a 'living together' within the meaning of the statute. This seems to be the reasonable and practical construction of the law, and the one which we think the legislature intended. If the law should receive the construction that there must be physical dwelling together in order to satisfy the statute, it is plain that the purpose of the law would in many cases be defeated, because in many cases the spouse may be absent from home for long intervals, although there is no break in the marriage relation, no estrangement, and no intent to separate or sever the existing relation or change the relations or obligations created by the marriage contract." *Northwestern Iron Co. v. Industrial Commission of Wisconsin,* 154 Wis. 97. See, also, *T. J. Moss Tie Co. v. Tanner,* 44 Fed. (2d) 928; *Pykosz v. Koehler & Streng Co.,* 105 Pa. Super. Ct. 605; *Jones v. George R. Cooke Co.,* 250 Mich. 460; *Conway v. County of Todd,* 187 Minn. 223; *Woods v. American Coal & Ice Co.,* 25 S. W. (2d) (Mo. App.) 144; *Birmingham Slag Co. v. Johnson,* 214 Ala. 131.

A wife who has not forfeited or otherwise lost any marital right may be living with her husband at the time of his death in an industrial accident, within the meaning of the workmen's compensation law, though then involuntarily confined in an asylum for the insane. The following conclusion was reached in a recent case:

"In a proceeding under the workmen's compensation act, evidence held to show that the deceased employee's widow, whose mind had been impaired for years and who had spent much time in various hospitals but was living temporarily with a son in another city when her husband was killed, was living with her husband at the time of his death, within St. 1917, sec. 2394-10, subd. 3." *Belle City Malleable Iron Co. v. Industrial Commission,* 174 N. W. 899 (170 Wis. 293). See, also, *Kelly v. Hopkins* (1908) 2 Ir. R. 84.

In view of the law and the facts as outlined, plaintiff made a case for compensation. For the specific purpose of

allowing it on the record as it now stands, the judgment of dismissal is reversed and the cause remanded for further proceedings.

REVERSED.

JAMES ZAJIC, ADMINISTRATOR, APPELLANT, V. ELMER JOHNSON ET AL., APPELLEES.

FILED FEBRUARY 21, 1934. No. 28724.

1. Trial: DISMISSAL. Evidence examined, and *held* to sustain the determination of the trial court, made at the close of plaintiff's proof, that the Omaha Bee-News Publishing Company and the World-Herald Publishing Company, defendants, each possessed the status of an independent contractor in the transaction complained of and each was without liability for the damages in suit; further, the evidence justifies the dismissal of the cause as to these defendants then made.
2. Negligence. Instruction of the trial court, stating in effect that, deceased and the driver of the automobile in which deceased was riding at the time of the collision being then engaged in a joint enterprise or undertaking, the negligence of the driver in the operation of the automobile, if any such negligence was proved, in view of the facts established by undisputed evidence, is imputable to deceased, is approved.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Crofoot, Fraser, Connolly & Stryker, for appellant.

Wear, Garrotto & Boland, Kennedy, Holland & DeLacy and *Wells, Martin, Lane & Offutt, contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and HASTINGS, District Judge.

EBERLY, J.

This action was brought by the administrator of the estate of James F. Zajic to recover damages for the latter's death. This fatality was caused by the colliding of a Packard sedan, wherein deceased occupied a rear

seat, with a truck owned by one defendant, of which another defendant was driver, and which truck was then transporting the property of the defendant publishing companies. At the close of plaintiff's evidence the trial court sustained the separate motions to dismiss of the defendants Omaha Bee-News Publishing Company and the World-Herald Publishing Company, for the reason that these defendants were independent contractors in the instant transaction. Thereafter further evidence was adduced and the cause was submitted to the trial jury who returned a verdict for Elmer Johnson and Chester A. Eager, the remaining defendants. From the order overruling his motion for a new trial the plaintiff appeals.

As to the first question, the facts disclosed by the evidence are not in serious dispute. The truck involved at the time of the accident was the property of the defendant Chester A. Eager. It was being driven by the defendant Johnson, who was then employed in that capacity by Eager, from whom he received his compensation. The route followed went from Omaha to Lincoln, to Nebraska City, and to Louisville, all in Nebraska. The truck was one of a number of trucks then owned and operated by Eager in the prosecution of a general trucking business, carried on under the trade-name of the Louisville Motor Transfer Company, with headquarters at Louisville, Nebraska. This business had been continuously carried on for a period of about 14 years. During this period Eager held himself out to the public as ready to engage in the transportation of goods for hire for any one who offered merchandise to be hauled.

The plan followed in carrying on the general business by this defendant was to keep one of his trucks hauling freight on a scheduled run between Omaha and Louisville. The other trucks owned by the defendant were employed in hauling from one town to another as the calls for service might require. It was a daily business of trucking for hire, in performance of which the trucks were owned by defendant Eager, who employed, paid, discharged, and

controlled his drivers and other employees, as the exigencies of the traffic might require.

Up to six years prior to the accident in suit, the Sunday editions of the newspapers published by the defendant publishing companies had been delivered to their patrons in part by railway train service and in part by other means of transportation. The defendant Eager then entered into negotiations to secure this business. Some test runs were made and the results submitted to these publishing companies. Finally an oral agreement for the transportation of the Sunday editions of the Omaha Bee-News and the Omaha World-Herald was entered into whereby these papers, prepared in bundles, labeled, and weighed by the publishers at their respective places of business in Omaha, were delivered to the trucks of the Louisville Motor Transfer Company at Omaha on Saturday night or early Sunday morning, accompanied by lists showing the destination of each bundle of papers thus turned over. The employees of the defendant received these bundles, loaded the same in the trucks and thereafter cared for the same, and deposited each at the place directed. These trucks, exclusively in charge of the motor transfer company's operators and driven to definite places where delivery of papers was required, proceeded in accord with a definite time schedule agreed upon by the parties in interest. The routes followed from one scheduled stop to another were for the determination of the transfer company. It seems that, in the event of an accident to truck or cargo occurring, the fact was to be at once reported to the publishing companies. We infer that the selection of the particular truck for each trip on each route, as well as the employees to man the same, and the furnishing of necessary oil, grease, gasoline and repairs of the fleet of trucks thus engaged, was wholly performed by the defendant Eager. He hired and fired the men engaged. He settled all indebtedness incurred in the transaction, and gave all necessary directions to the employees concerned in, and apparently assumed full responsibility

for the successful completion of, each of the runs made. We have searched the record and find no evidence of control over these movements of the transportation agency either reserved by the publishing companies in this oral understanding, which is controlling, or exercised by them pursuant to its terms. Considering all the evidence, we are impressed with the view that, as a matter of fact, the weekly delivery of these papers, though made pursuant to a special understanding and agreement, was but an incident of the general business carried on by the defendant, and essentially no different in its inherent qualities from that of which it formed a part.

This general business was the undertaking "for hire or reward, to transport the goods of such as choose to employ him from place to place" (10 C. J. 39)—that of a common carrier. *State v. Union Stock Yards Co.*, 81 Neb. 67.

"Persons who engage in the business of draymen, carters, truckmen, wagoners, or public moving van companies for the transportation of goods and merchandise, and who hold themselves out as willing to serve all who apply and pay their charges, are common carriers in respect to the carriage of such goods and merchandise as they make a business of carrying, and it is immaterial what mode of transportation is employed, or that there is no regular tariff of charges." 10 C. J. 49.

Obviously the relation of a public common carrier with its patrons is not ordinarily that of "master and servant." It may be generally conceded "that a common carrier may * * * act as a private carrier, and it has been held that a common carrier may become a private carrier when, as a matter of accommodation or special engagement, it undertakes to carry something which it is not its business to carry." 10 C. J. 39. Plainly the facts in the instant case do not invoke the application of the principle last quoted.

The appellant relies upon *Showers v. Lund*, 123 Neb. 56, *Cole v. Minnick*, 123 Neb. 871, *Standish v. Larsen-Merryweather Co.*, 124 Neb. 197, and *Bowen v. Gradison Construction Co.*, 236 Ky. 270. In none of these cases is the

relation of a public common carrier to its patron considered; hence, the doctrine announced therein can have no application to the instant case.

However, conceding *arguendo* that the status of the motor transfer company is that of a private carrier or contractor, still the facts outlined herein differentiate the instant case from those cited on this point by appellant. Support for this conclusion may be gained from the discussion which the opinions referred to contain. Thus, in *Bowen v. Gradison Construction Co., supra,* the Kentucky court, on the ground of essential difference of the facts involved, distinguished, and in distinguishing approved, two cases, as to which it makes use of the following language:

"This court is not alone in making a distinction between a servant working as Givans was in *Berry v. Irwin* and men working as Owen Richards was in this case; for example in *Paquet v. Pictorial Review,* 130 Misc. Rep. 389, 223 N. Y. 686, Sheridan & Duncan were employed to deliver to the Pictorial Review concern certain paper for which their pay was based upon the weight of the material delivered. The Pictorial Review had a man in charge of the unloading, to check the weight of the material delivered and to tell the men where to put it. In such unloading Paquet was injured. He sued the Pictorial Review Corporation. It was held the plaintiff had no cause of action against the Pictorial Review.

"We could show this same distinction is made by the courts of other states, but we will content ourselves by showing how the United States supreme court does it. * * * In *Standard Oil Co. v. Anderson,* 212 U. S. 215, 29 S. Ct. 252, 53 L. Ed. 480, these were the facts: A stevedore named Terrence was loading with case oil the steamship Susquehanna. He had contracted with the Standard Oil Company for the use of its steam winch and its winchman to do the hoisting, and for this he was to pay the Standard Oil Company $1.50 per thousand. This winchman negligently and rapidly lowered a draft of cases into the hold of the Susquehanna and injured Anderson, for

which injuries he received a judgment against the Standard Oil Company, which was affirmed.

"Let us take another look at these cases. Berry & Kelly had a definite lot of stone to haul and were hauling it, Sheridan & Duncan had a certain lot of paper to haul and they were hauling it, and the Standard Oil Company had a definite amount of case oil to hoist and they were hoisting it. In all these cases it was held these parties were independent contractors."

Obviously the controlling principle in the two cases thus referred to by the Kentucky court is applicable here. The conclusion follows that the publishing companies here had certain papers to haul, and they were having them hauled by "independent contractors," at the time of the accident in suit.

However, even on the basis that the Louisville Motor Transfer Company in this transaction possesses the status of a private carrier, the facts involved remove this from the scope of the controlling principle announced in *Showers v. Lund, supra,* and bring it squarely within the doctrine of the following authorities, which determine in principle that the status of the publishing companies here involved is that of independent contractors: 39 C. J. 1315; 2 Meecham, Agency (2d ed.) sec. 1870; 2 Cooley, Torts (3d ed.) 1092; *Neff v. Brandeis,* 91 Neb. 11; *Bodwell v. Webster,* 98 Neb. 664; *Barrett v. Selden-Breck Construction Co.,* 103 Neb. 850; *Knuffke v. Bartholomew,* 106 Neb. 763; *Petrow & Giannou v. Shewan,* 108 Neb. 466; *Potter v. Scotts Bluff County,* 112 Neb. 318.

It must be admitted that the transaction under scrutiny is not novel in the newspaper world, and that courts of high standing have confirmed the right of newspaper publishing companies to employ private truckers, as independent contractors, to deliver their publications. *Gall v. Detroit Journal Co.,* 191 Mich. 405, 19 A. L. R. 1164; *Schickling v. Post Publishing Co.,* 115 Ohio St. 589; *Abate v. Hirdes,* 9 La. App. 688.

The controlling facts being undisputed, the question

presented was one of law for the court to determine. It follows that its action in dismissing the cause as to the publishing companies was correct and is approved.

With reference to the submission of the issues to the trial jury, complaint is made as to certain instructions given, which, in effect, informed the triers of fact that the negligence of the driver of the Packard sedan, in which the deceased was riding at the time of the accident, if any such negligence was established by the evidence, was imputable to the deceased.

In support of this contention certain decisions of this court are cited, commencing with *Hajsek v. Chicago, B. & Q. R. Co.*, 68 Neb. 539. In this case the rule is announced in the following language: *"Except with respect to the relation of partnership, or of principal and agent, or of master and servant, or the like,* the doctrine of imputed negligence is not in vogue in this state." (Italics ours.)

It will be noticed that the exceptions, as well as the general rule, are substantially reiterated in each of the cases cited by the appellant.

The evidence discloses that James F. Zajic, a musician, for whose death recovery is sought in this action, some time previous to this accident, organized an orchestra of seven men, of which he was one. It was, as disclosed by the record, an unincorporated musical organization for the financial profit of those who comprised it, and adopted as its name the Golden Prague Orchestra. It was the business of this orchestra to furnish orchestral music for balls, dances, and other like entertainments, for monetary consideration, in Omaha and other places in the eastern part of Nebraska. For use in connection with this business, the membership of this organization purchased the Packard sedan in May preceding the accident, had this vehicle overhauled, and had a special contrivance constructed thereon in which to carry their musical instruments. Each of the seven members owned a share in this Packard car. The financial proceeds of the musical en-

gagements filled by this organization were in part divided among the membership and in part devoted to the expenses connected therewith, including gasoline, oil, and repairs for their automobile. So far as disclosed by the record, this automobile was intended to be used solely for the purpose of transporting the membership to and from the engagements filled by the Golden Prague Orchestra. It was thus a necessary part of the equipment made use of in the business they carried on. On the night of the accident it was returning from an engagement at Lincoln, Nebraska, and was in the charge of a member of the orchestra as driver who, it may be inferred from the record, acted in that capacity with the approval, if not as the selection, of the membership of the orchestra, and who was so acting at the time of the collision with the Eager truck, from which the death of plaintiff's intestate resulted, which is now here in suit.

Obviously the Golden Prague Orchestra, in view of the facts stated, was either a copartnership, or an unincorporated association. The latter term may be defined to be a body of persons acting together without charter, but upon methods and forms used by incorporated bodies, for the prosecution of some common enterprise. The common enterprise in the instant case was to carry on a business in which property jointly owned by the membership was employed, in connection with their personal services, for the financial advancement of the membership.

Regarded as a voluntary unincorporated association, it would be "liable in tort for the wrongful acts of its members when acting collectively in the prosecution of the business for which it is organized. * * * So it may be held liable for the tort of an individual member when, in respect to the act complained of, the association occupies the relation of principal." 5 C. J. 1345, 1346.

In any event, in view of the admitted relations between the membership of the Golden Prague Orchestra at the time of the accident and the nature of the business in which it was then employed, its membership present and

participating must be deemed to have been then engaged in a joint enterprise within the meaning of that term as employed in the law of negligence.

There is no substantial conflict in the evidence as to this point, and the question presented as to the legal effect of the conceded relations of the parties was one of law for the decision of the trial court. In this view of the situation, the instruction of the court as to imputed negligence was correct. *Judge v. Wallen*, 98 Neb. 154; *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627.

No error affirmatively appearing in the record, the judgment of the trial court is correct, and is

AFFIRMED.

ROY LEHNHERR, APPELLANT, V. NATIONAL ACCIDENT INSURANCE COMPANY, APPELLEE.

FILED FEBRUARY 21, 1934. No. 28771.

1. **Pleading**: CONDITIONS PRECEDENT. "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part." Comp. St. 1929, sec. 20-836.
2. ———: ———. In this jurisdiction, where it is sufficient for plaintiff to allege generally the performance of all conditions precedent, it is incumbent upon the defendant to deny specifically the performance of the particular condition relied on as a defense.
3. ———: DEFENSE. "A defense not pleaded cannot be considered in the decision of the case." *World Mutual Benefit Ass'n v. Worthing*, 59 Neb. 587.
4. **Insurance**: PLEADING: WAIVER. If the defendant insurance company fails to set up a condition precedent contained in the insurance policy in suit, and fails to allege its breach by the plaintiff, such defense is waived.
5. **Evidence** demurred to examined, and *held* to establish the cause of action pleaded.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Reversed.*

F. A. Hebenstreit, for appellant.

J. H. Falloon, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

EBERLY, J.

This action was originally commenced by Roy Lehnherr in the county court of Richardson county upon a policy of accident insurance issued by the defendant to plaintiff. It appears that from a judgment entered in the county court of Richardson county an appeal was prosecuted to the district court for the same county. Here, by stipulation of the parties, the cause was tried to the court on the original pleadings as filed in the county court, a jury being expressly waived. The petition, it may be said, pleaded according to legal effect the issuance, delivery, and terms of the policy, the happening of the accident insured against, the damages occasioned thereby, and the refusal of the company to pay, followed by an appropriate prayer. As to the performance of the conditions of the policy, it is alleged in the petition: "That the said plaintiff has performed all the conditions and provisions as set out in said policy." To this the defendant filed a general denial, the only allegation contained therein being: "Comes now the defendant and denies each and every allegation contained in the petition of the plaintiff."

At the opening of this trial in the district court a further stipulation was entered into, with reference to the insurance policy in suit, in the following form, viz.: "It is further stipulated that the defendant company made and issued to Roy Lehnherr policy No. 23,647 and that the same was in full force and effect at all times during the controversy and that the said policy may be received in evidence." Thereupon the original policy in suit, identified as exhibit 1, was received in evidence. The plaintiff then proceeded with the introduction of evidence, at the close of which the defendant, by its attorney, demurred

to the evidence, "on the ground the testimony offered by the plaintiff does not prove a cause of action under the terms of the policy which they have introduced in evidence." The trial court sustained this demurrer, and dismissed the action, expressly on the ground "that the conditions of the policy were not complied with by the plaintiff in that no notice of the injury was given by the plaintiff to the defendant company within twenty days or within a reasonable time after the injury to the plaintiff occurred." Thereupon plaintiff filed his motion for a new trial, which was overruled, and he now prosecutes his appeal.

It may be said in passing that the policy in suit contained two provisions relative to notice of injury, which are therein set forth in the following terms:

"Written notice of injury on which claim may be based must be given to the company within twenty days after the date of the accident causing such injury.

"Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the company at its home office, Lincoln, Nebraska, or to any authorized agent of the company, with particulars sufficient to identify the insured, shall be deemed to be notice to the company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible."

Thus, the ultimate question here presented is: Does the evidence adduced establish the cause of action set forth in the petition, in view of the issues submitted by the pleadings of the respective parties to the trial court for determination?

The defendant, in effect, contends that the giving of notice of injury within twenty days, or a reasonable time thereafter, as provided by the terms of the policy in suit already quoted, constituted an express condition precedent to the liability of the insurer; and that, due performance

of all conditions contained in the policy having been alleged generally by plaintiff, defendant's general denial thereof made up an issue and imposed on plaintiff the burden of establishing the affirmative, which the latter had failed to sustain.

Conceding that the duty to give notice of the injury is imposed on plaintiff by the terms of his insurance contract, and that the same constitutes a condition precedent, still the contentions of defendant are not well founded. By statute in this state the rule of pleading on this subject is: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part." Comp. St. 1929, sec. 20-836.

It is not questioned but that plaintiff in the instant case has substantially complied with this provision. But the only issue tendered by defendant to meet plaintiff's allegation was in the terms of a general denial. This was insufficient to make up the issue on which it now relies, or to support the judgment of the trial court.

"In jurisdictions where it is sufficient for plaintiff to allege generally the performance of all conditions precedent, it is incumbent upon defendant to deny specifically the performance of the particular condition relied upon as a defense." 14 Standard Ency. of Procedure, 59. See, also, Ostrander, Fire Insurance (2d ed.) sec. 415; 3 Bancroft, Code Pleading, sec. 1597.

It will be remembered that the purpose of the statute is to simplify pleading, and only by requiring the defendant to set forth the particular condition which is relied on as a defense may the plaintiff be advised of the exact defense he will be required to meet, and the trial court informed as to the exact issue to be determined. Accordingly, under statutes similar in terms to our own, the practice seems to be that "The facts constituting the breach of condition relied on as a defense must be alleged with sufficient particularity and certainty to show *prima facie* a breach." 14 Standard Ency. of Procedure, 59.

See, also, *United States Casualty Co. v. Hanson,* 20 Colo. App. 393; *Hoffecker & Bro. v. New Castle County Mutual Ins. Co.,* 5 Houst. (Del.) 101; *Tillis v. Liverpool and London and Globe Ins. Co.,* 46 Fla. 268; *Allen v. Phoenix Assurance Co.,* 12 Idaho, 653; *Gilkey v. Sovereign Camp,* W. O. W., 178 S. W. (Mo. App.) 875; *Dimick v. Metropolitan Life Ins. Co.,* 67 N. J. Law, 367; *Elliott v. Agricultural Ins. Co.,* 3 Atl. (N. J.) 171; *Fischer v. Metropolitan Life Ins. Co.,* 167 N. Y. 178; *Evarts v. United States Mutual Accident Ass'n,* 16 N. Y. Supp. 27; *Queen Ins. Co. v. Excelsior Milling Co.,* 69 Kan. 114; *Johnson v. Woodmen of the World,* 119 Mo. App. 98.

And when the defendant relies upon a breach, which by the terms of the policy works a forfeiture, all the essential facts of the breach must be distinctly stated in the answer and be strictly proved. *Farmers & Merchants Ins. Co. v. Newman,* 58 Neb. 504; *Sharpe v. Grand Lodge,* A. O. U. W., 108 Neb. 193.

In the construction of the Nebraska statute quoted, this jurisdiction was early committed to the rule that, "Where the insurer relies upon a stipulation in a policy to defeat a recovery, it must plead affirmatively a breach thereof as a defense." *Farmers & Merchants Ins. Co. v. Wiard,* 59 Neb. 451.

The case of *Stratton v. Service Life Ins. Co.,* 117 Neb. 685, is instructive on the question now under consideration. This was an action at law on a life insurance policy. The plaintiff's petition may be said to be in the usual form, with a copy of the policy attached as a part thereof, and contained the general allegation that all conditions of the contract had been performed. The answer admitted the issuance of the policy, the death of assured, and proofs of loss, and then contained the further allegation: "Defendant denies each and every allegation and averment in plaintiff's petition except as herein expressly admitted to be true." The defendant actually relied upon an alleged breach of one condition contained in the policy in suit, but failed to plead his defense except as indicated. The

district court thereupon sustained plaintiff's motion for judgment on the pleadings, which, on appeal, was affirmed in this tribunal. One of the reasons on which this decision proceeds was: "Where the issuance of a policy of insurance is admitted, and the insurer relies upon a breach of a condition thereof as a defense, the facts showing such breach must be specially pleaded in the answer."

In the instant case we have essentially the same controlling principle involved. We find a general denial only as defendant's pleading, but accompanied by a specific admission in the record of the issuance of the policy in suit, and that it was in full force and effect at all times during the controversy. The proof in the record is that the accident actually occurred, and that the plaintiff sustained a compensable injury, the result of which, entitling the assured to reimbursement, is fully established. The defendant actually relies upon failure to perform a condition which amounts to a breach of the policy, as constituting his defense, but he has failed to comply with the rule that "the facts showing such breach must be specially pleaded in the answer." This defense therefore may not be considered. Obviously, on the issue in fact made by the pleading, the evidence plainly sustained the right of plaintiff to recover, and the district court erred in sustaining the demurrer to the evidence.

The defense on which the defendant relies was not pleaded, and "a defense not pleaded cannot be considered in the decision of the case." *World Mutual Benefit Ass'n v. Worthing*, 59 Neb. 587.

In view of the technical nature of the proceeding now before us, the rule applicable to the situation presented by this record is: "If the defendant fails to set up a condition precedent and its breach by the plaintiff, this defense is waived." 11 Standard Ency. of Procedure, 1019. See, also, *Kahnweiler v. Phenix Ins. Co.*, 67 Fed. 483; *Philip Schneider Brewing Co. v. American Ice-Machine Co.*, 77 Fed. 138; *Mutual Life Ins. Co. v. Dingley*, 100 Fed. 408.

We have not overlooked plaintiff's contention that the instant case is within the provisions of section 44-322, Comp. St. 1929, and that the evidence wholly fails to show that the breach of the condition contributed to the loss. Obviously, the determination that the claimed breach of the condition has not been pleaded, as required by our statute, and is therefore waived, wholly eliminates this contention from consideration. The question involved in the statute last referred to is not presented by the record now before us, and as the case will necessarily be retried on the same issues that were originally submitted to the county court, any expression of opinion thereon would accomplish no legitimate purpose.

It follows that the district court erred in sustaining the demurrer to the evidence. Its judgment is therefore reversed and the cause remanded for further action in harmony with this opinion.

REVERSED.

BELVA STANLEY, APPELLEE, V. SUN INSURANCE OFFICE, APPELLANT.

FILED FEBRUARY 21, 1934. No. 28725.

1. Witnesses. If one has been surprised, misled, or entrapped into calling a witness, who testifies against him, because of his statements, either oral or written, made before trial, which were favorable to and relied upon by the party calling him, and relate to a material point in issue, counsel should be permitted to inquire and show such contrary statements in an honest attempt to repair this damage.
2. ———. Counsel should be allowed to interrogate his own witness as to such inconsistent statements, for the purpose of refreshing his memory, probing his conscience, and thus inducing him to correct his mistake, if any.
3. ———. Counsel should be allowed to show such previous inconsistent statements of his own witness, for the reason, if for no other, that he may show the court and jury the circumstances which induced him to call and vouch for such a witness.

APPEAL from the district court for Washington county: WILLIAM G. HASTINGS, JUDGE. *Reversed.*

Cook & Cook and *Henry Mencke,* for appellant.

Patrick & Smith, contra.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

PAINE, J.

This is an action to collect damages upon a fire insurance policy on the contents of a dwelling-house destroyed February 21, 1932. The jury returned a verdict for plaintiff in the sum of $1,800.

The petition alleges that the defendant issued a $2,000 fire insurance policy September 1, 1930, through its agent at Blair, against damage by fire to household furniture, jewelry, and wearing apparel while located in a dwelling-house on a farm in Washington county, Nebraska; that immediately after the fire the plaintiff notified the agent writing the policy, and sent notice by registered letter to the defendant at its office in Chicago; later filed proof of loss and demanded payment, and the company refused to pay the same. After certain preliminaries were disposed of, the defendant filed answer, denying that the property destroyed was of the value of $2,000, admitting the receipt of proofs of loss, and charging that the plaintiff and her husband, George Stanley, wrongfully and fraudulently entered into an unlawful conspiracy to burn said dwelling-house, and that the husband, with her consent and connivance, wilfully, unlawfully, and intentionally, set fire to said dwelling, thereby forfeiting all rights to the policy; that the statements contained in the proof of loss were false and untrue, and that the property destroyed by fire was worth not to exceed the sum of $1,000. To this the plaintiff filed a general denial.

In the absence of the jury, Mr. Patrick, of plaintiff's counsel, moved for an order excluding Henry Mencke, county attorney, from acting as an assistant attorney for

the defense, citing section 26-906, Comp. St. 1929, and several witnesses were called in support of the motion, and Henry Mencke, county attorney, was called as a witness in resistance of the motion. Arguments were then made, and the motion to exclude the county attorney from so acting was overruled by the court, and the jury duly impaneled and the opening statements made. Thereupon, the jury were excluded from the room, and it was brought to the attention of the court that two witnesses called by the defendant had been tampered with and were assuming a hostile attitude towards the defense. These two matters are stated in this record to show somewhat of the strain and bitterness existing at this trial. The trial of the case consumed several days, and the jury returned a verdict for $1,800 for the plaintiff.

One of the principal assignments of error charged is that the court erred in refusing to permit counsel for defendant, while its witness Orwin L. Miller was testifying, to interrogate him in regard to a former sworn statement which had been made by him to the deputy state fire warden regarding what he observed at the time of the fire, which statement was absolutely contradictory to his sworn testimony on the trial, and counsel for the defendant being taken entirely by surprise, and, further, that the court erred in not allowing the defendant to make a proper record in order to predicate error upon this erroneous ruling.

The bill of exceptions discloses that Orwin L. Miller testified that he was 20 years of age, was living at Goodwin, Dakota county, now, but that for about a year he had lived with his parents in the little brick house on the Stanley farm, and his father was a tenant of Dr. Stanley, husband of plaintiff, and that they were living there on the day of the fire; that on the Sunday morning when the fire occurred he was out in his yard working on his car, two or three hundred yards from the Stanley house. He and his father saw smoke coming out around the chimney when they got over there, and his father

knocked out a window on the screened porch. The smoke had the smell of oil, which could have been from waxed floors or composition board. That he then broke in the door with an axe, as it was locked; that they cleared out the contents of some of the downstairs rooms.

Mr. Cook then asked this witness, Orwin L. Miller, whether he had made a statement before the deputy fire warden of this state. Objection was made, and the ruling of the court was this: "I don't think we care." Again Mr. Cook started to ask the question: "And at that time were you asked by the deputy marshal"—to which Mr. Patrick objected as an attempt to cross-examine his own witness; and Mr. Smith, also of counsel for plaintiff, added the objection that it was an attempt to impeach his own witness; but the court permitted him to finish the question, and he completed the question already started by adding—"certain questions relative to what you saw and what you observed as you reached the Stanley home, and what you smelled when the window was knocked in?" Without further objection, the court said: "I think we will stop there. We have two questions now." Then an objection was made that it was an attempt to cross-examine and impeach his own witness and improper redirect examination, and the court said: "I think, Mr. Cook, you should not attempt to introduce the statement made by this witness in that examination." Mr. Cook then asked to make a record, and asked that the jury be excused, and the court said: "Put it in right as you are required to do, if called for." Then Mr. Cook dictated a long statement to the reporter, stating in brief that the plaintiff was taken by surprise by the testimony of the witness and desires to direct the attention of the witness to a statement in writing made by this witness to the deputy fire marshal, which answers are contrary to the statements made by the witness now on the stand, and he desires to direct witness' attention to the statement made at that time, which statement is not offered for the purpose of impeaching the witness, but to show that he

has made contrary statements, or to refresh his memory, and that counsel has undertaken to lay the proper foundation for that purpose, but has been prevented from doing so by the ruling of the court. The reporter then identified the statement made May 23, 1932, in writing to Horace M. Davis, the deputy fire marshal, and signed by the witness, Orwin L. Miller, and consisting of four pages; and Attorney Cook then stated, in brief, that, if permitted to do so, he would have directed the witness' attention to the statement therein made when he was asked if he detected the odor of anything, and that said witness in reply to said question stated that he detected a strong odor of gasoline or of coal-oil, and that the explosion, which occurred when his father kicked in the window, knocked his father back on the ground. Attorney Cook stated that he desired, if permitted to do so, to direct the witness' attention to his signature on the statement and refresh his recollection, but if witness denies that he made such a statement, he does not propose to attempt to offer the same in evidence to impeach his own witness, as that would be violative of the rules, and that no further foundation can be laid for the reason that counsel, as shown by the record, has been foreclosed by the orders of court. "The Court: You have a written statement there signed by the witness? Mr. Cook: Yes. The Court: Submit it, please; I would like to look at it. (Mr. Cook hands exhibit 4 to the court.) Mr. Smith: To all of which offer and each and every part thereof, together with exhibit 4, the plaintiff objects for the reason that the same is incompetent, irrelevant, and immaterial, and not proper redirect examination, and an attempt by the defendant and its counsel to impeach its own witness by an alleged statement made upon another occasion. The Court: I think the objection will be sustained, and the jury will not consider any of this matter which is rejected, in making up their verdict." Thereupon, the witness, Orwin L. Miller, was excused from the stand.

This action of the trial court is set out at length as the

fifth assignment of error, in that the statements of fact of the witness Orwin L. Miller, made to the deputy fire warden in writing, were diametrically opposed and contradictory to his sworn testimony at the trial; that said witness was unfriendly and counsel for defendant was taken by surprise; that the court erred in refusing to allow defendant to even make a proper record in said matter.

The general rule in Nebraska in relation to this matter was for many years, as elsewhere, that a person who calls a witness thereby recommends him as worthy of belief, and afterwards cannot be permitted to introduce evidence which has no tendency other than to impeach said witness. *Nathan v. Sands,* 52 Neb. 660; *Blackwell v. Wright,* 27 Neb. 269. One is not permitted to prove contradictory statements of his own witness and thereby discredit him, and it is improper for counsel in argument to assert contradictory statements of the witness. *Merkouras v. Chicago, B. & Q. R. Co.,* 101 Neb. 717; *Masourides v. State,* 86 Neb. 105.

In *Crago v. State,* 28 Wyo. 215, it is shown that, under the Code Justinian, one was not allowed under the Roman law to generally impeach his own witness, and then there is shown the gradual change to the modern rule.

In 6 Jones, Commentaries on Evidence, 4794, it relates that the first time this rule appears in England it simply recites that "Holt, C. J., would not suffer the plaintiff to discredit a witness of his own calling, he swearing against him. * * * Still later the principle is said to have been adopted in Warren Hasting's case, June 11, 1789, when Thurlow, Lord Chancellor, refused, without giving any reason, to allow the prosecution to establish that a certain portion of a paper which they had introduced was untrue." *Adams v. Arnold,* Holt K. B. 298, 90 Eng. Reprint, 1064.

This matter is also treated historically to the length of 45 pages in 2 Wigmore, Evidence, 252-297. This text shows that in the earliest times, in the primitive modes

of trial, witnesses were merely "oath helpers," gathered into a band to "swear him off" against another band swearing the other way. The article shows the injustice of this rule, and that it was changed in England by statute in 1854, and later in some of our states. A summary of this complete analysis by Wigmore is set out at some length by Judge Letton in the case of *Penhansky v. Drake Realty Construction Co.*, 109 Neb. 120, concluding that the rule as to the contradiction of one's own witness, as stated in the last three Nebraska cases cited above, is set aside on the grounds, briefly condensed from Wigmore, that the rule is a mischievous one and cannot promote justice, while in many cases it promotes injustice, for if a witness betrays the party who calls him and falsifies in every statement which he makes, the jury has no alternative but to accept and find an unjust verdict on evidence which both the parties know to be the rankest perjury.

The general rule that a party, who is surprised by unfavorable testimony given by his own witness, may inquire concerning previous inconsistent statements made by him, is subject to several limitations. One is that the testimony must be a definite statement of fact, and not a mere conclusion, as shown in *Lewis v. Miller,* 119 Neb. 765, 70 A. L. R. 532, where Judge Hastings found that, aside from conclusions contained in the statement, there was very little in the statement that might be deemed contradictory of the testimony given by the witness when testifying in behalf of the defendant, and that the conclusions contained in the statement would not have been admissible if she had been a friendly and willing witness, and decided there was no error in the trial court in refusing to receive in evidence written statements under those conditions.

Judge Eberly had occasion to examine the case of *Penhansky v. Drake Realty Construction Co., supra,* and held that, where it was shown that the facts were fully known to counsel when he called the witness to the stand, and

he could not have been misled or entrapped by statements appearing in the first deposition, and it is incredible that he could in any manner have relied upon or been deceived by the testimony, then the rule does not apply. *Blochowitz v. Blochowitz,* 122 Neb. 385.

Other exceptions to the rule occur when a party is compelled to call the adverse party as his own witness, or in those cases when one is bound by law to call a certain witness, even though he may be unfriendly or hostile, such as a subscribing witness to a will; and in *State v. Alexander,* 89 Kan. 422, it was held that the prosecution might prove that the witness called by it was drunk at the time of observing the occurrences to which he testified. The general tendency of the later decisions appears to be towards liberality in permitting impeachment of one's own witness in order to prevent an injustice.

But, aside from these and a few other reasonable limitations, if one has been surprised, misled, or entrapped into calling a witness because of his statements, either oral or written, made before trial, which were favorable to and relied upon by the party calling him, and relate to a material point at issue, and, when called, has testified contrary thereto, counsel should be permitted to show the statements which had been made before the trial. In most cases such departure from his original testimony will relate to only one or two items in the whole story of the witness, and there is no good reason why the party calling him should not get the benefit of his testimony on all the other points and yet be able to show that he is mistaken, or has changed his testimony on certain definite points. For the court to forbid this is to impose a captious and purposeless restriction, which suppresses a portion of the truth, and when the counsel calling such witness is not at fault, he should be permitted to repair this damage as far as possible. This may be done for the purpose of refreshing the memory of his witness, as well as for the purpose of probing the conscience of the witness and inducing him to correct his testimony.

It is proper to allow the party who called this witness to inquire concerning his previous inconsistent statements, for the purpose of showing the jury the circumstances which induced such party to call this witness.

Abundant citations covering the several phases of this question will be found in the long note in 74 A. L. R. 1042. The following cases will support this discussion of this troublesome question: *Hickory v. United States*, 151 U. S. 303; *Cady Lumber Co. v. Wilson Steam Boiler Co.*, 80 Neb. 607; *People v. Marsiglia*, 52 Cal. App. 385; *Arine v. United States*, 10 Fed. (2d) 778; *Estate of Dolbeer*, 153 Cal. 652, 15 Ann. Cas. 207.

It is the opinion of the court that in the case at bar the defense was clearly entitled to show that its own witness had changed his testimony as to a material fact in a manner harmful to the defense. Many other errors are argued in the briefs, but as a reversal is warranted because of this error which has been discussed at length, the others will not be set out in this opinion. For the reasons stated, the judgment of the trial court is reversed and new trial ordered.

REVERSED.

JAMES W. ELWOOD, APPELLANT, V. PEARL F. SCHLANK ET AL., APPELLEES.

FILED FEBRUARY 21, 1934. No. 28767.

1. **Appeal.** Where a verdict of a jury is counter to the physical facts it will be set aside on appeal.
2. **Evidence** examined, and *held* that the verdict of the jury is contrary to the undisputed physical facts shown by the record.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Kennedy, Holland & De Lacy and *Charles Matson*, for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

CHASE, District Judge.

This is an action to recover damages for personal injuries growing out of the alleged negligent operation of the automobiles operated by the plaintiff and the defendant Jacob Schlank.

The plaintiff for his cause of action alleges that about 10 o'clock on the night of April 2, 1931, he was driving his automobile eastward on the paved highway near the village of Waverly in Lancaster county, Nebraska; that, while so driving at a reasonable rate of speed, the defendant Jacob Schlank, who was driving his automobile westward at or near the same point, suddenly turned his car to the left to pass a truck that was going in the same direction immediately ahead of this defendant, and while passing the truck, defendant drove his car to the left, crossing the black line in the middle of the pavement, into the plaintiff's proper lane of travel, and while in that location, the defendants' car collided with the car of the plaintiff. The defendant Jacob Schlank answered denying the allegations of negligence in plaintiff's petition, and by way of cross-petition alleged that he was driving his automobile traveling westward at the point set forth in plaintiff's petition at a careful and lawful rate of speed, traveling on the right side of the center line of the pavement; that he at the point in question approached a large truck proceeding in the same direction; that while he was driving close to the rear of the truck, it suddenly turned to the right and proceeded partly onto the right shoulder of the highway, as he thought to avoid being hit by the automobile being driven by the plaintiff, which at that time was being driven at a high rate of speed in excess of 50 miles an hour; that the plaintiff at this point was driving his automobile on the wrong side of the paved highway; that while operating his automobile in such a position, his car collided with

the car driven by the defendant Jacob Schlank. The defendant Pearl F. Schlank also answered by way of cross-petition alleging that she was the owner of the automobile driven by her husband Jacob Schlank, and because of plaintiff's negligence her automobile was damaged. Both defendants prayed judgment against plaintiff on the cross-petitions.

The cause was submitted to the jury upon the issues of fact presented by plaintiff's petition and the answers and cross-petitions of the defendants, and a verdict was returned against the plaintiff upon his petition and in favor of both defendants on their cross-petitions. From the overruling of a motion for new trial, the rendition of a judgment upon the verdict, the plaintiff has appealed to this court.

The appellant bases his appeal upon two assignments of error: First, that the evidence is insufficient to support a verdict; and, second, the court erred in failing to submit to the jury the question of contributory and comparative negligence.

An analysis of the first proposition necessarily involves a careful consideration of the evidence as shown by the record. It appears that at this point the highway is paved with a concrete slab approximately 24 feet in width. There is practically no dispute as to the physical facts as they appeared immediately following the collision of the two automobiles. All of the witnesses agree that neither car was turned over; that the plaintiff's automobile was found with the right front wheel and fender across the ditch and up against the bank on the south side of the road considerably off the pavement angling somewhat to the southeast, the left front wheel being down off the shoulder of the grade with the left hind wheel resting upon the shoulder of the grade a short distance off the pavement. The defendants' car stopped three or four feet immediately north of plaintiff's car angling from northeast to southwest; that both cars had the left front wheel, fender and front corner badly

crushed; that the truck driver stopped his truck between 75 and 100 feet to the west of where the cars stopped and on the north side of the pavement with the right front wheels on the shoulder of the grade. The plaintiff testifies that he was driving eastward, and when the front end of his car approached to a point within 20 or 25 feet of the front end of the truck, a car shot out from behind the truck very fast and was on him in a second; that the plaintiff decided to take the ditch and pulled his car sharply to the right off the pavement, and while the right wheel was down at the ditch the defendants' car struck the car of plaintiff; that in so doing the defendants had driven their automobile across the pavement to the extreme south side thereof, and while at that point the collision occurred; and that the truck was then just opposite or directly north of the cars when they collided. He also testifies that immediately following the accident, just after the defendant Jacob Schlank had emerged from his car, he had a conversation with him; that he was reluctant to talk, but finally did speak and told plaintiff that he lived at Albion, Nebraska; that he was driving 40 or 45 miles an hour and that he suddenly came up behind the truck which was without rear signal lights and was so close to him that he had to swing out and go around in order to avoid a collision with the truck, and that while he was swinging around the truck his car collided with plaintiff's car.

An adjuster for an indemnity company testified that he investigated the facts concerning the case under the erroneous belief that his company had compensation insurance upon the defendant Jacob Schlank; that while making an investigation he took a written statement from him, and in this statement (which was offered in evidence) he stated that he suddenly discovered a truck in front of him without lights, moving in the same direction, and in order to avoid a collision with the truck, "I swung to the left and was going to pass around this truck when I discovered a car coming from the opposite direction and

before I could get in the clear I collided with a car driven by Doc Elwood."

Dr. Alexander Young, Schlank's attending physician, who also made a report for the Royal Indemnity Company, wrote out a statement and testified that according to his best recollection he received the information either from Mr. or Mrs. Schlank, he was not sure which, in which it was stated that the accident occurred from a head-on collision of automobiles as the patient (Jacob Schlank) was attempting to pass a truck going in the same direction, speed 40 to 45 miles an hour.

The defendant Jacob Schlank denies that he had the conversation detailed by plaintiff immediately following the accident; also his mind is somewhat hazy as to whether he made the statement to the insurance adjuster as stated in his report, and finally claims that it was not his language but that of the adjuster, and he has no recollection of making such a statement; that he made no such statement as recorded by the adjuster.

As we have before observed, the witnesses practically all agree that immediately following the collision both cars stopped on the right-hand side of the paved highway, plaintiff's car a short distance off the pavement and defendants' car to the north of it on the pavement very close to the south line of the paved slab. It seems to us these undisputed physical facts ought to be regarded as controlling in establishing how the accident occurred. Giving due consideration to the immutable laws of force and motion, we must conclude that the accident could not possibly have occurred as claimed by the defendant Jacob Schlank. Had the plaintiff been driving eastward on the north side of the painted line describing the middle of the paved slab of the highway at the rate of speed claimed by the defendants, and while in that position the plaintiff's car was driven against the car of the defendants, the force of the plaintiff's car would have either stopped the defendants' car in that position or forced the defendants' car toward the edge of the pavement on the north side

of the highway. In other words, it appears to us that it would be an impossibility for the plaintiff's car to have been in the ditch on the south side of the highway had the collision occurred north of the middle line of the pavement as the defendants describe it. However, the physical facts do not stand altogether uncorroborated. We find both the insurance adjuster and Doctor Young, who are each disinterested and thus could have no motive to tell an untruth, testifying that they wrote down a description of this accident as given them by the defendant Jacob Schlank that the accident occurred substantially as detailed by plaintiff. We cannot believe that either the insurance adjuster or Doctor Young, neither of whom appear to have known anything about the accident except what someone told them, had created these statements out of their own imagination. We are not unmindful that this court on many occasions has announced that it will not disturb the verdict of a jury based merely upon conflicting evidence; and in considering that question the truth or falsity of the testimony becomes immaterial. This verdict, however, is assailed for the reason that the record discloses that there is not sufficient evidence to support it. In an investigation of that character it becomes the duty of the appellate court to analyze the testimony of the witnesses and the physical facts in connection therewith. Thus, in disposing of such a contention the truth or falsity of the testimony then becomes a very proper subject of investigation. Another rule is well established in this state, and that is, where the verdict of the jury is opposed to the undisputed physical facts shown to exist, this court will set the verdict aside. *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692; *Oliver v. Union P. R. Co.*, 105 Neb. 243; *Calnon v. Fidelity Phenix Fire Ins. Co.*, 114 Neb. 53. We find nowhere in the record where the trial court was given an opportunity to instruct the jury to return a verdict in favor of the plaintiff on defendants' cross-petitions. Had counsel for plaintiff given the trial court an opportunity to have passed upon

the sufficiency of the evidence to support a verdict in favor of the defendants on their cross-petitions, in all probability such a motion would have been sustained.

Since the verdict must be set aside for insufficiency of evidence to support it, it becomes unnecessary to discuss the other contention that the trial court upon its own motion should have submitted the question of contributory and comparative negligence to the jury.

For reasons heretofore stated, the judgment is reversed and the cause remanded.

REVERSED.

JAMES P. MOONEY ET AL., APPELLEES, V. DRAINAGE DISTRICT NO. 1 OF RICHARDSON COUNTY ET AL., APPELLANTS.

FILED FEBRUARY 21, 1934. No. 28633.

1. **Constitutional Law**: DRAINAGE ACT. *Held*, that article 4, ch. 31, Comp. St. 1929 (sections 31-401 *et seq.*) is constitutional in so far as it provides for the organization of drainage districts and the construction, maintenance, and repair of drainage systems. *Barnes v. Minor*, 80 Neb. 189.
2. **Statutes**: DRAINAGE ACT: CONSTITUTIONALITY. *Held*, that the provisions of section 31-456, Comp. St. 1929, are not of such vital importance that they formed an inducement to the remainder of the law. Its invalidity would not operate to avoid the whole, and could not be relied upon to excuse a duty enjoined by the valid portion of the act. *State v. Malone*, 74 Neb. 645.
3. ———. A consideration of the constitutionality of section 31-456, Comp. St. 1929, is not necessary to a decision in this case, and we express no opinion thereon.
4. **Drains**. It was the intent of the legislature in the enactment of the provisions of article 4, ch. 31, Comp. St. 1929, to impose a duty on drainage districts organized thereunder to maintain and keep in repair the drainage systems constructed under the powers given them by such act, to the end that landowners whose land was assessed for the construction of such system on the basis of expected benefits from such construction may be protected in the enjoyment of such benefits.
5. ———. The performance of the power delegated to a drain-

age district by section 31-463, Comp. St. 1929, involves the protection of public and private interests and "may" as used therein should be construed as mandatory. *Doane v. City of Omaha*, 58 Neb. 815; *Greb v. Hansen*, 123 Neb. 426.

6. ———. The enlargement of the outlet of defendant's drainage system is improvement and repair within the meaning of the terms as used in section 31-463, Comp. St. 1929, and under the authority of said section, the defendant may make such improvement and finance the same by an assessment on the basis of the original assessment of property in the district. *Richardson County v. Drainage District No. 1*, 113 Neb. 662.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed as modified.*

Wiltse & Wiltse and *W. J. Courtright*, for appellants.

J. B. Cain and *Hall, Cline & Williams, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and CLEMENTS, District Judge.

CLEMENTS, District Judge.

This is an action brought by the plaintiff, James P. Mooney, for himself and all others similarly situated, asking for an order requiring the defendant, a drainage district organized under article 4, ch. 31, Comp. St. 1929 (sections 31-401 *et seq.*) to increase the carrying capacity of the outlet of a drainage canal constructed by it, to an extent sufficient to drain the plaintiff's land of water brought to it by the ditches and laterals constructed by the district.

The outlet to defendant's drainage canal is common to it, and eight other drainage districts that have been organized in the same watershed and along the same stream, "The Great Nemaha river."

When the action was commenced, all these other districts were made parties defendant on the theory that the court, in this action, could order them to contribute to the cost of the proposed enlargement of the outlet.

Demurrers filed by these other districts to the petition were sustained, and the action dismissed as to them.

The cause was tried before the Honorable John B. Raper, of the first judicial district, resulting in a finding for plaintiff and an order requiring the defendant district to increase the carrying capacity of the outlet of the canal to approximately 11,500 cubic feet of water per second.

Both parties appeal; the defendant from the entire finding and judgment of the court; the plaintiff from the order that the increase in carrying capacity shall be only to 11,500 cubic feet per second, plaintiff claiming that such carrying capacity is entirely inadequate and not based upon any evidence in the case.

An examination of the pleadings leads to the conclusion that, in preparing them, the parties entirely overlooked the admonition of the statute that they shall be "in ordinary concise language without repetition." The petition consists of 23 pages. The answers originally contained 51 pages. Twenty-eight paragraphs of the answers were stricken out by the trial court as immaterial. The trial of the case seems to have been conducted in the same expansive spirit in which the pleadings were framed. The bill of exceptions contains approximately 1,000 pages of evidence, much of which it is entirely unnecessary to consider.

From this mass of evidence, we gather the following facts which seem to be pertinent to the issues: On February 14, 1906, the defendant Drainage District No. 1 of Richardson county was established by decree of the district court of that county. This district occupies about 30 miles of the lower part of the valley of the Great Nemaha river, and consists of about 31,000 acres of land. The district was organized for the purpose of constructing a system of drainage for the land. After the establishment of the district, and in conformity with the law under which it was organized, an appraisement of the benefits to this land to be expected from the construction and maintenance of a suitable drainage system was made. These benefits were shown to be in the aggregate the sum of $1,190,387.66.

A drainage system was then constructed at a cost of approximately $285,909. Since the construction of this drainage system, the district has expended for improvements, repairs, and maintenance, the further sum of $275,127. To meet these expenditures assessments have been made aggregating the sum of $561,036. Of this sum, Richardson county has paid $35,718, and the Burlington and the Missouri Pacific railroads have paid as benefits the sum of $36,104, the balance, being approximately the sum of $459,654, was assessed to and paid by the landowners of the district. Just how much of the total expenditures should be charged against the appraised benefits the record does not disclose, but, assuming that it should be all so charged, it will be seen there is still $629,351 of unassessed benefits upon which the district can draw by assessments for legitimate purposes.

The plaintiff and the others, in whose interest he sues, are owners of approximately 6,000 acres of land within the district. This land lies in the extreme lower part of the Great Nemaha river valley, between a point on said river designated in the pleadings and evidence as bridge 64 and the Missouri river. The location of this bridge is between seven and eight miles from the junction of these rivers. This 6,000 acres of land has little elevation above the river, and before the construction of the drainage system was low, wet land. It was appraised as 100 per cent. land; that is, it was appraised as receiving the maximum benefit from the drainage. Of the $459,654 assessed against the 31,000 acres of land in the district, this 6,000 acres was assessed the sum of $137,310.

When the drainage system was constructed, nearly all the work was done and money expended above bridge 64. Some work was done between this point and the Missouri river, in removing brush and logs from the Great Nemaha river, but its channel was not enlarged or deepened. It seems to have been assumed that the natural channel of the river below bridge 64 would be sufficient to take care of the run-off from the entire watershed. This assump-

tion proved correct for a time, and during some years after the construction of the drainage system, it operated satisfactorily and the land of the complaining landowners was drained and received the benefits expected. However, as years passed, improvements were made in the upper part of the district. The channel of the river was straightened, erosion increased the size and carrying capacity of the ditches and laterals, other drainage systems were constructed higher up on the river, and the run-off of the watershed was emptied into the main stream and by it brought to bridge 64 so rapidly that the channel of the river below that point was, and now is, entirely inadequate to take care of it; the consequence being that, whenever there is any considerable rain over the watershed, the water overflows the banks of the river below bridge 64, inundates the plaintiffs' land, ruining their crops, and rendering their situation as farmers intolerable. It is shown by the evidence that, owing to this cause, one to three floods occur each year which cover the valley below bridge 64 from bluff to bluff a depth of one to three or four feet. In this condition of affairs, the plaintiffs petitioned the officers of the district to take steps to increase the carrying capacity of the outlet of the drainage system to take care of this influx of water, and, their petition being refused, they brought this action asking that a mandatory injunction issue directing the defendant to take such steps for their relief.

The defendant district seeks to justify its refusal to afford relief to the plaintiffs on several grounds:

1. That the law under which the district was organized is unconstitutional, and the court has no jurisdiction to order or decree to plaintiffs any relief. It is argued that the whole act under which the district is organized is unconstitutional and void because it purports to give legislative power to the courts. The answer to this is the act does not purport to, nor does it, confer upon the court any powers other than its ordinary judicial functions. This matter was considered by us in the case of *Barnes*

v. Minor, 80 Neb. 189. In that case the constitutionality of the act was attacked upon the same ground as in this. The law was held to be constitutional, the court saying:

"Manifestly, as it seems to us, the court in such a proceeding is called upon to exert no other than its ordinary judicial functions. The statute prescribes that, if certain steps have been taken and certain facts exist, a governmental corporation shall be deemed to have been created, not otherwise, and the court by the exercise of its usual powers and by the observance of judicial methods ascertains and determines that such steps have or have not been taken, or that such facts do or do not exist, and from these premises draws an inference or reaches a conclusion which it pronounces in a form of a judicial order or judgment in like manner and in like effect as in ordinary cases."

We are entirely satisfied with our holding in *Barnes v. Minor, supra,* and with the reasoning upon which it is based. However, if we were not, we would have no hesitation in refusing to hold the organization of this district invalid at the behest of the district itself, after it has functioned for 28 years, has made and collected assessments, built and improved a drainage system, borrowed money, issued bonds, invoked the powers of the courts, sued and been sued, all as a public corporation organized under the law it now claims is void because unconstitutional.

It is also contended that the law is unconstitutional because section 31-456, Comp. St. 1929, permits assessments beyond benefits as a possibility, and its application would result in an arbitrary apportionment contrary to benefits. This question does not arise in this case unless it is found that section 31-456, Comp. St. 1929, is of such vital importance to the whole act that it was an inducement to the passage of the remainder.

"Whether any specific power which the act undertakes to confer upon the board is constitutional or not, can only be tested when the board assume to exercise it, and

the other portions of the act could not be defeated by its invalidity, unless the nature of such unconstitutional power was such as to render it of vital importance to the whole." *People v. Mahaney*, 13 Mich. 481.

"Invalid provisions of an act, not operating to avoid the whole, cannot be relied on to excuse the performance of a duty enjoined by the valid portions of the act." *State v. Malone*, 74 Neb. 645.

We are satisfied that the provisions of section 31-456, Comp. St. 1929, are not so vital to the act that the law would not have been passed without its inclusion. The act seems to be complete and capable of enforcement without reference to this section. When assessments are attempted to be made under the provisions of this section, its validity can be tested. We express no opinion as to its constitutionality, leaving that to be determined in a proper case.

2. The defendant's second contention is that the drainage board has exclusive power to determine what drainage work shall be done, and the court is without power to direct what the board shall do.

We think that the situation of the complaining landowners, as shown by the record in this case, leads to the conclusion that they are entitled to the relief asked for; that their land having been appraised as receiving the maximum benefit from the drainage system, and having paid assessments for the construction and maintenance of the system on the basis of such benefits, they should be protected in the enjoyment of these benefits. We are met, however, with the bald statement by the defendant district: "We admit that we have the right and power to make the improvement required to effectuate the relief of plaintiffs, but deny that it is our duty to do so, and therefore the court is without authority to order us to act in the matter." (Reply Brief.)

This then is the crux of the situation. If the district owes a duty to the landowners, whose land was assessed, to build the drainage system, to maintain it, and keep it

in repair, so that they may enjoy the benefits for which the land was assessed, and the district, without sufficient justification, refuses to perform this duty, then the court, in a proper case, has the authority to order it to act in the line of its duty. On the other hand, if the district owes no duty to these landowners, but, as contended by defendant, it has the absolute arbitrary discretion to refuse to maintain all or any portion of the system, then a minority of the landowners who have contributed to its construction may, by a selfish majority, be denied any benefit from the improvement, their property may be taken without just compensation, and their despoilers may defy the courts to afford them any redress. The defendant's theory is so repugnant to the spirit of right and justice that pervades our laws that we approach the subject confident that the act under which this district was organized cannot be so construed.

Both plaintiff and defendant contend that the question has been settled by former decisions of this court. Each maintains that it was settled in his favor. We think both are mistaken, and that we have no controlling precedent upon which to base a decision in this matter. In several former decisions of this court, notably *Bunting v. Oak Creek Drainage District*, 99 Neb. 843, *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550, *Miller v. Drainage District*, 112 Neb. 206, and *Flader v. Central Realty & Investment Co.*, 114 Neb. 161, we have said or implied in argument that it is the duty of a drainage district such as the defendant to maintain its drainage system, and that its failure to do so renders it liable in damages to a person injured by its negligence. In some of the cases this thought found its way into the syllabi. However, as pointed out in *Compton v. Elkhorn Valley Drainage District*, 120 Neb. 94, a determination of this question was not necessary to the decision in any of these cases. The statements that it was the duty of drainage districts to maintain their ditches may therefore be regarded as dicta

and not binding as a precedent in the determination of this case.

In *Compton v. Elkhorn Valley Drainage District, supra,* language was used in argument which seems to imply that the court was then of the opinion that the law does not make it the duty of drainage districts to maintain their ditches or keep them in repair. This idea was not, however, reflected in the syllabus. It was used by the court in argument rather than as a vital proposition of law. It was not necessary to the decision in the case, and cannot therefore be considered as a precedent binding upon the court in the instant case. This is true for other reasons. The *Compton* case was an action for damages based upon the common-law liability of a public corporation for an injury caused by the negligence of its officers. It was not, as is this, an action by landowners, whose money has been taken by the district to construct an improvement on the theory that their land would be benefited, to compel repairs necessary if such benefits are to be realized.

Again, in the *Compton* case, the court was not considering the act under discussion here. Elkhorn Valley Drainage District is organized under article 5, ch. 31, Comp. St. 1929. Some of the provisions of this article are similar to provisions in article 4, but the section of article 4 that provides for repairs and improvements is entirely omitted from article 5.

Section 31-463, Comp. St. 1929, provides: "If at any time after the final construction of such improvement the same shall become out of repair, obstructed, inefficient, or defective from any cause, the board of supervisors may order an assessment upon the lands and property benefited by the drainage system for the purpose of placing the same in proper and suitable condition for drainage purposes, using the original assessment upon the property in the district as a basis to ascertain the ratio that each separate tract or lot of land or property bears to the whole amount to be levied."

The interpretation of this section depends entirely upon the construction to be given to the word "may" as used therein. This court has consistently construed "may," when used in a statute to delegate a power, the performance of which involves the protection of public or private interests, as mandatory, and not merely permissive. "Whenever a statute requires the performance of an act for the sake of justice or the public good, the word 'may' is the same as 'shall' and imposes a positive and absolute duty." *People v. Commissioners of Buffalo County,* 4 Neb. 150. When used in a statute, the word "may" is construed as imperative "whenever the public interests or individual rights call for its exercise." *State v. Buffalo County,* 6 Neb. 454. "Where it is plain that the legislature intended to impose a duty rather than confer a privilege" the act is mandatory. *State v. Farney,* 36 Neb. 537. "The word 'may,' when used in a statute or enactment to impose a duty or delegate a power, the performance of which involves the protection of public or private interests, will be read as 'must,' and construed as mandatory." *Doane v. City of Omaha,* 58 Neb. 815. "The word 'may' in public statutes should be construed 'must' whenever it becomes necessary to carry out the intent of the legislature." *Greb v. Hansen,* 123 Neb. 426.

The law under which the defendant is organized conferred upon it the power to collect great sums of money from landowners upon the basis of benefits to be derived from the drainage of their land and its protection from floods and overflows. Was it the intention of the legislature that this money could be spent in the building of a costly drainage system which might through the neglect or obstinacy of drainage officers be permitted to become so defective or inefficient that it would be an injury rather than a benefit to the landowners whose money was taken to construct it and who are ready and willing to pay for needed improvements? The intent of the legislature must be gathered from the whole act. A careful examination of this act leads us to the conclusion that it was the in-

tent of the legislature to make it the duty of the district to maintain its drainage works, within the limits of its power, to the end that the benefits assessed against the land should become and remain effective to the landowners. Again, it is plain that the performance of the power granted to the district by section 31-463, Comp. St. 1929, involves the protection of both public and private interests and that "may," as used in such section, should be construed as mandatory. We therefore hold that it is the duty of the district to take such steps, within the limits of the power conferred upon it by the law, to make such repairs to its drainage system as may be necessary to drain the land within the district, including the land of the plaintiffs, and to protect such land from overflows and floods.

While this holding is based upon a construction of the statute under which the defendant is organized, it is in consonance with general principles as laid down by textwriters, and the decisions of other courts. In 2 Farnham, Water and Water Rights, 1032, sec. 208, it is said: "An owner of land within the drainage district, who has been assessed for the cost of the drain, may compel the officers, by mandamus, to alter an outlet which has proved to be insufficient to drain his property so as to afford the drainage for which he has paid."

In *Stoddard v. Keefe,* 278 Ill. 512, the court said: "Where the landowners of a district have been assessed and taxed for the construction of drains and ditches for their lands and the ditches or drains as constructed have proved inadequate for the purpose for which they were intended, the landowners have a right to require the commissioners to adopt and construct a system of drainage which will provide main outlets of ample capacity to take care of the waters of the district." See, also, *Peotone & Manteno Union Drainage District v. Adams,* 163 Ill. 428.

3. The defendant contends, in effect, that even if the court should find the law constitutional, and that a duty devolved upon the district to maintain the drainage sys-

tem and keep it in repair, still it cannot be compelled to enlarge the outlet of its canal because the work involves new construction and cannot be considered as repairs. This question was before this court in a former case involving this same defendant. In that case, identical in principle with this, the district took a position exactly opposite to that urged here. The question was disposed of in an able opinion by Judge Shepherd in *Richardson County v. Drainage District No. 1*, 113 Neb. 662. It seems that, as the drainage canal of the district was originally constructed, it followed the lower course of Muddy creek to the Nemaha river. For some distance below the junction of the canal with this river, no excavating was done and the channel of the river was not improved except to remove some obstructions. It was assumed that the river channel would be effective to take care of the water brought to it by the canal. This proved to be correct for some years, but in 1925 the river channel, owing to a number of bends below the junction, to the angle at which the canal entered it, and to a greater influx of water brought to the canal by new drainage works above, became inefficient to provide sufficient drainage and floods resulted. (It will be noted this condition exactly parallels the situation that is responsible for the present action.) The district determined that, to correct this condition, it was necessary and advisable to carry the water to a point below the bends in the Nemaha. This involved the construction of a new ditch two miles long in a different location and at a cost of $35,000. A supplemental assessment to raise this sum was therefore ordered on all the land in the district, based on the original appraisement of benefits. Richardson county, being one of the parties against whom the assessment was made, protested and, its protest being denied, brought an action to enjoin the district from making the proposed improvement. This action was based and the relief asked urged on the same theory advanced by the defendant in the instant case, viz., that the proposed improvement is new work, goes beyond

the limit of repair, and the district is without power to make it. The trial court found against this contention and refused the injunction. The case reaching this court on appeal, we held: "The right of the supervisors to keep a ditch in repair is not limited to making good its defects in the precise place of its original construction, when the nature of the soil and the general topography do not admit of successful operation there, but it includes the right to make the ditch effective to the use for which the license to construct the same was granted, and hence to straighten its channel or to lengthen and better its outlet." We think this is a correct statement of the law. It is buttressed by the holdings of many other courts (see *Lee v. County of Jackson,* 151 Minn. 310; *Board of Supervisors v. Paine,* 203 Ia. 263; *Petersen v. Sorensen,* 192 Ia. 471; *Yeomans v. Riddle,* 84 Ia. 147) and is decisive of this question.

The defendant argues that, as it is undisputed that lands in the upper portion of the district will receive no benefit from the proposed enlargement of the outlet, an assessment against such land would be void because made in excess of benefits. The district has changed its position since it successfully defended in *Richardson County v. Drainage District No. 1, supra,* assessments made for an improvement that not only did not benefit individual tracts of land in the lower part of the district but was a detriment to such tracts by the more rapid influx of water to the land caused by the straightening of the channel of the ditch in its upper reaches. This question was also settled in the former case where we said, speaking of the inefficient condition of the ditch in the upper portion of the district:

"This condition affected every owner in the district, much as a loss of function in the human body affects the whole man, and became a matter of moment to all. * * * The portion of the statute upon which the district depends is found in section 1806, Comp. St. 1922, which provides that, if a ditch of this kind shall become 'out of

repair, obstructed, inefficient, or defective,' the board of supervisors may order an assessment for the purpose of placing the same in proper condition, using the original assessment upon the property of the district as a basis for so doing. * * * It would seem that the statute should be construed liberally for the purpose of giving effect to the intent of the legislature, which undoubtedly was to make the drainage contemplated by the act effective."

Little attention need be given other contentions of defendant, viz.: (1) "No new drainage plan can be carried out until the plans are submitted to, and authority obtained from, the department of public works." The law in question is found is section 81-6329, Comp. St. 1929, and provides: "All plans for proposed drainage districts shall be approved," etc. It is evident this refers to plans for a new drainage system, proposed by a district in process of organization, and has no reference to plans for the improvement or repair of ditches that, after construction, have become inefficient and defective.

(2) "Upper riparian owners, separately or by association in a drainage district, may * * * accelerate the flow of water through natural streams, without being liable to the lower riparian owners." This may or may not be the law, depending largely on whether section 31-456, Comp. St. 1929, is held valid or not. It may be of importance if, and when, an attempt is made to force contribution from other districts for the cost of the improvement. It can have no application in a controversy between the district and landowners whose land has been assessed on the basis of benefits which they are not enjoying because the drainage system has become defective and inefficient.

In view of the foregoing, we hold:

(1) That article 4, ch. 31, Comp. St. 1929, is constitutional in so far as it affects the organization of the drainage district and the construction, maintenance, and repair of a drainage system; that the defendant is duly

organized under said law, and has all the powers and duties conferred thereby.

(2) That an examination of the constitutionality of section 31-456, Comp. St. 1929, is not necessary to the decision of this case.

(3) That a district organized under this act has the power to construct a drainage system and to maintain, improve, and repair it, within the limit of the appraised benefits to the land within the district; that whenever such drainage system becomes out of repair, defective, or inefficient for any reason, it is its duty to improve and repair it, within the limit of its power, so that it may serve the purpose for which it was constructed, and to the end that the landowners may receive the benefits for which the land is assessed.

(4) That the drainage system of the defendant district has become defective and inefficient because the outlet below bridge 64 is too small to properly care for water brought down by the ditches and canals of the district, and to prevent the flooding of plaintiffs' land; that such condition can be remedied and proper improvements and repairs can be made by the district within the limit of its powers.

(5) That the general finding of the trial court for the plaintiff was correct.

We have now to consider plaintiff's cross-appeal.

It is shown by the evidence that the carrying capacity of the outlet of the defendant's drainage system below bridge 64 is 8,440 cubic feet per second, and that this outlet has to take care of the entire run-off of the watershed consisting of an area of 1,875 square miles located in that part of Nebraska having the greatest rainfall. It is conceded by all parties that the outlet is entirely inadequate for such purpose. Four civil engineers were called as witnesses and examined as to the extent to which the outlet should be enlarged to properly care for the water. These men were experts in drainage matters. Their testimony ranged from 18,000 to 25,000 cubic feet per

second. We think the conclusion to be drawn from the evidence is that the minimum capacity of the outlet should be 20,000 cubic feet per second. The trial court first found the figure 20,000 cubic feet to be correct for the enlargement. He later changed this to 18,000 cubic feet, and still later to 11,500 cubic feet, which became the final figure for his decree.

No one is satisfied with this finding. The plaintiff appeals from it. The defendant, in its brief, p. 19, says: "All of the attorneys are agreed that the decision is entirely unsupported by any engineering testimony (or any other testimony)."

We have carefully examined all the testimony in an endeavor to find therein a basis for the trial court's finding. It is true that, in some cases, conditions and circumstances are shown that justify a court in findings not supported by any direct evidence. This does not seem to be such a case. The question of the capacity of an outlet to care for the run-off of a great watershed such as we are considering is peculiarly a problem for experts, and depends upon computations made from a knowledge of the average rainfall, the quality of the soil, the slope of the land, and many other factors not known to laymen. We do not think the court's finding that the outlet should be increased to a capacity of 11,500 cubic feet per second is supported by any evidence, or that such an enlargement is sufficient to afford the complaining landowners the relief to which they are entitled. We therefore hold that the findings and decree of the district court should be modified to require the defendant district to enlarge the outlet of its drainage system between bridge 64 to the Missouri river to a minimum carrying capacity of 20,000 cubic feet per second, and that, as so modified, the finding and judgment should be affirmed.

The defendant complains that such improvement will involve the outlay of a large sum of money which the district, at this time, will be entirely unable to raise. We think it is too pessimistic in this regard. The consensus

of the evidence of the experts is that to enlarge the outlet of the system to a capacity of 20,000 cubic feet would cost approximately $50,000. This, in the aggregate, is a large sum of money. However, when spread by an assessment over 31,000 acres of land, it amounts to about $1.65 an acre. This does not seem to be unduly oppressive, especially when it may be paid in instalments covering a period of years. It must also be remembered that the complaining landowners, whose land will be assessed as 100 per cent. land, will, on their 6,000 acres of land pay 30 per cent. or $15,000 of the cost, leaving but $35,000 to be assessed against the remaining 25,000 acres, being approximately $1.40 an acre.

The method of financing the proposition and the plan for accomplishing the improvement lie within the discretion of the district board. The district court did not, nor will this court, attempt to interfere with this discretion, but the district must act and its acts must be commensurate with its duty.

AFFIRMED AS MODIFIED.

GENEVIEVE BERG, APPELLEE, V. J. M. GRIFFITHS, APPELLANT.

FILED FEBRUARY 21, 1934. No. 28756.

1. Jury. The constitutional right to a trial by jury in a civil case provided by section 6, article 1 of our Bill of Rights, is a mere personal privilege which the litigant may waive.
2. ———. Failure of counsel to again inquire of juror, incompetent and ineligible, because of his age, *held* not waived, where trial court has asked the qualifying questions and the juror failed to disclose his ineligibility, when that fact is unknown to counsel or parties.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Reversed.*

Chambers & Holland, Joseph C. Reavis and *C. Russell Mattson,* for appellant.

John C. Mullen, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

RYAN, District Judge.

Plaintiff brought this action to recover damages alleged to have been sustained by her because of the defendant's negligence in the operation of his automobile. A jury was impaneled and sworn to try the case and returned a verdict in favor of the plaintiff. A motion for a new trial was filed in due time, and about a month later a supplemental motion for a new trial was filed, in which the additional assignment of error was made that one Rudolph Watzke, Jr., who served as a juror in the case, was not a competent and eligible juror to serve as required by law, in that he was under the age of 25 years at the time; and this fact was unknown to the defendant or his attorneys until after the verdict was rendered; that the attorneys for the defendant relied upon the qualifying questions as to the competency of the juror which were put by the court at the commencement of the trial and that said attorneys were deceived and misled by the failure of Rudolph Watzke, Jr., to advise the court upon said questioning that he was under the age of 25 years. It is undisputed that the juror in question was but 22 years of age at the time of the trial. This appears from the affidavits filed and from a certified copy of his birth certificate. It also appears from the affidavits of defendant's counsel and from another juror and the affidavit of the court reporter that, when the jury were impaneled and counsel on both sides were present, the court directed a series of qualifying questions to the jurors; that the juror Rudolph Watzke, Jr. was seated with the rest of the jurors; that among the questions asked by the court was this: "Are any of the members of this panel under the age of 25 years?"; that none of the jurors responded to the inquiry, either by word or sign; that the court then said: "I take it, then, that you are all over the age of 25 years?"

and that none of the jurors made any response to this question.

The principal error relied upon for reversal by appellant is that the court erred in overruling defendant's motion for a new trial because of the incompetent and ineligible juror. Section 3, art. I of the Bill of Rights, Constitution of Nebraska, provides: "No person shall be deprived of life, liberty, or property, without due process of law." And section 6, art. I thereof, provides: "The right of trial by jury shall remain inviolate." There are three sections of the statute defining who are competent to serve as jurors in the district court. They are all uniform as to the minimum age limit being 25 years. Richardson county, in which this case was brought, is a county of less than 30,000 population, and section 20-1601, Comp. St. 1929, is the section which applies. This provides: "All males residing in any of the counties of this state, having the qualifications of electors, over the age of twenty-five years, and of sound mind and discretion * * * are and shall be competent persons to serve on all grand and petit juries, within their counties respectively." Section 20-1623, Comp. St. 1929, provides: "It shall be the duty of the court to discharge from the panel, all jurors who do not possess the qualifications provided in this article as soon as the fact is discovered." The above seems to set forth the statutory law applicable to this case.

No case in this state or elsewhere has been cited to the court that is exactly in point. In none of the cases cited to us does there appear to have been an examination made by the court for the express purpose of determining the competency of the jurors making up the panel. The rule is well settled that, where the attorneys fail to interrogate the juror in his examination on his *voir dire,* the objection has been waived. *Hickey v. State,* 12 Neb. 490; *Wilcox v. Saunders,* 4 Neb. 569; *Rockwell v. Elderkin,* 19 Wis. 388; *Eastman v. Wight,* 4 Ohio St. 156. In all these cases the objection seems to go to the residence of the juror and is a matter which could have been discovered by counsel in

the *voir dire* examination, if reasonable diligence had been exercised.

The latest analogous case in this state is that of *Marino v. State,* 111 Neb. 623. In this case it was urged that Herbert M. Jackson, one of the jurors who sat in the case, was not a qualified and competent juror under the Constitution and laws of the state; that, at the time of the trial and for a long time prior thereto, the said Jackson was not a resident or elector of Douglas county; that this fact was not known by the defendant or his counsel until after the rendition of the verdict. True, this was a criminal case and a prosecution for murder in the first degree, but this court has held that the rule is the same in criminal as in civil cases. *Hickey v. State, supra.* The record in the case of *Marino v. State, supra,* discloses that the juror Jackson had been a resident of Douglas county, Nebraska, for some years; that more than six months prior to the trial of the case he had removed with his family to Aurora, Hamilton county, Nebraska, where he was engaged in business; that he voted in the city election in Aurora; that he was drawn for jury service in Douglas county and a subpœna was sent to his former address in Omaha by registered mail; the letter was forwarded to him at Aurora, Nebraska; that he responded to the notice and appeared and served upon the jury in the case. There is some dispute as to whether or not the general question was asked of the jurors, as a whole, whether they were residents and electors of Douglas county; if not, to so signify. It was undisputed, however, that the county attorney elicited from the juror on his *voir dire* examination that he was a resident of Omaha, Douglas county, Nebraska, and that he had lived at No. 8409 Thirty-first street. The court concluded from all the evidence introduced in support of the motion for a new trial that the juror was not a resident of Douglas county at the time he served on the jury. This court in that opinion said:

"The next question presented is whether the defendant waived the disqualification of the juror by failing to inter-

rogate him upon his *voir dire* as to his qualifications. Considering all of the circumstances presented in the record, we think he did not. It is shown by the affidavits of the defendant and his attorneys that they had no knowledge of the disqualifications of the juror until after the verdict was rendered. When the juror answered that he lived in Douglas county, in response to the inquiry of the county attorney, we think the defendant's counsel might well have relied upon his statement, but the testimony indicates that they went further and inquired as to his qualifications as an elector. We think that due diligence was exercised by the defendant in ascertaining the qualifications of the juror, and that the court, as well as counsel for the state and the defendant, were misled and deceived."

In this case, after the court had asked the qualifying questions as to the age of the jurors and the juror Watzke failed to disclose his incompetency to act on account of his age, no duty rested upon counsel to repeat the inquiry and they cannot be held to have waived that objection.

Justice Maxwell in *Hickey v. State, supra,* quoting from *Eastman v. Wight,* 4 Ohio St. 156, says: "It is certainly clear that all jurors must have the qualifications of electors; and if one not having such qualifications is retained upon the panel without the knowledge of the party or his counsel, and after reasonable diligence used to ascertain that fact, when the jury is impaneled, a new trial should for that cause be granted. But it is equally clear that the proper time to take the objection is at the inpaneling of the jury; and it must be taken to have been waived, unless the party is able to show to the court, upon the hearing of the motion, that with the exercise of diligence he could not have taken the exception at the proper time."

In the trial of this case counsel had a right to rely upon the answers given by the jurors in response to the questions put by the trial court and the inferences to be drawn from their failure to respond. It is clear from the record that the learned trial court relied upon their failure to respond to his first question and assumed that they were

all over the required age, when he stated: "I take it, then, that you are all over the age of 25 years."

Complaint is also made that the verdict of the jury is excessive, but as the case must be retried, it is unnecessary to express an opinion upon that question.

For the reasons above stated, the judgment is reversed and the cause remanded for a new trial.

REVERSED.

HILDEEGARD FREDRIKSON, APPELLEE, V. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

FILED FEBRUARY 21, 1934. No. 28788.

1. Death. "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." *Holdrege v. Livingston*, 79 Neb. 238.
2. ———. The evidence examined and *held* sufficient to warrant the presumption of death from the absence shown.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Brown, Fitch & West, for appellant.

Edith Beckman, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

RYAN, District Judge.

The defendant and appellant, Massachusetts Mutual Life Insurance Company, is a corporation and engaged in the general life insurance business. On the 6th day of January, 1923, it executed and delivered to Robert Fredrikson a policy of life insurance. The policy provided that on the death of the said Robert Fredrikson the defendant would pay to Hildeegard Fredrikson, the plaintiff herein, the

sum of $2,000. The plaintiff and her husband were married on April 16, 1917, and resided in Omaha, Nebraska. For some time prior to the 14th day of May, 1924, the husband was employed by the Trans-Mississippi Grain Company as bookkeeper and cashier. On the morning of the 14th of May, 1924, Mr. Fredrikson left home for work as usual. Fredrikson did not return that night and up to date he has failed to return. The plaintiff commenced this action in the district court for Douglas county on the 5th day of August, 1931, against the defendant, Massachusetts Mutual Life Insurance Company, for the sum of $2,000, with interest and the costs of suit. At the conclusion of the evidence the defendant moved the court to instruct the jury to return a verdict in its favor. The plaintiff also moved the court to instruct the jury to return a verdict in her favor. The court discharged the jury and sustained the motion of the plaintiff, overruled the motion of the defendant, and entered judgment in favor of the plaintiff for $2,163, together with interest thereon at the rate of 7 per cent. from the 6th day of December, 1932. The court also allowed the plaintiff an attorney fee of $250, to be taxed as part of the costs. The motion for a new trial was overruled and the defendant appeals.

The defendant makes four assignments of error. The first relates to the admission of evidence and the last three are in effect that the evidence is insufficient to sustain the judgment. There is no question of fact involved in the case, as the defendant did not introduce any testimony. The evidence shows that Robert Fredrikson, the insured, was a German by birth; that he came to the United States about the year 1911 and had received his first papers. He married the plaintiff in 1917, when he was 25 years of age. His domestic life appears to have been happy. He was a home loving man and never stayed away from home. He appears to have been a man of good habits and character, industrious and ambitious, and had been promoted by his employers. From the time of the marriage of the plaintiff, she and her husband had lived in Omaha, except

for a period of 15 months when they lived in Germany. He was a member of the Y. M. C. A. of Omaha and of St. Mary Magdalene Church. During all his Omaha residence he was employed by the Trans-Mississippi Grain Company as bookkeeper and cashier. He corresponded regularly with some members of his family in Germany. The morning following his disappearance the plaintiff received a note from him by registered mail, which read as follows:

"Honey Dear:

"I have gone wrong down in the office and have lost my job. I am not strong enough to face you so I must wander into the world and make good again. I know it will be hard for you, yet it is even more hard for me to leave the best wife on earth. Why I have done this I do not know. I will certainly make good again and I shall always take care of you.

"You will hear from me soon. I am ruined in Omaha. * * * Please destroy card. I shall write you soon. I am looking for a job. I have to make good or living will be worth nothing to me.

"Mr. Boyd will explain. $10 is all I have to spare till later.

"With love and broken hearted,

"Yours, Bob."

Shortly after the disappearance of Robert Fredrikson and after appellee had failed to locate her husband or hear from him, she notified the appellant of his disappearance. Three witnesses testified for the plaintiff, the plaintiff herself, Mrs. Rose Stefan, a sister of the plaintiff, and who had accompanied the plaintiff and her husband on their trip to Germany, and Sigmund Bauer, who is described as Fredrikson's closest friend. In addition to the evidence above set forth, the record shows that the plaintiff inserted an advertisement in a daily paper in Omaha, ran it for several days, and then, after a few weeks, repeated the advertisement. She did this several times. She also had their friend, Mr. Bauer, broadcast over the radio. She also corresponded with his family in Germany in an at-

tempt to learn of her husband's whereabouts, or if they had heard from him.

The first assignment of error is that the court permitted the plaintiff to answer the following question. "Q. And in all of their correspondence (referring to the correspondence received from his relatives in Germany) with you, have they ever stated that they have heard or seen of him?" Defendant objected to this as incompetent, irrelevant, hearsay, and not the best evidence. After some discussion the court permitted the witness to answer it. The witness answered: "They stated that they never heard of him." This answer was stricken and the court put the question to her: "Did they ever say in the letters that they heard from him or of him? A. No." Appellant argues that the reception of this evidence amounted to giving parol testimony as to the contents of certain letters without proof of the loss of the originals and also that it was not the best evidence. As to the objection that the question called for the contents of certain letters, we think it is not well taken. The witness did not state what the letters said, but merely stated the negative, that she did not get any information from the letters concerning the whereabouts of her husband. The court, in ruling upon defendant's objection, stated: "If you want the letters you can call for them." Defendant made no demand for the production of the letters.

The second, third and fourth assignments of error are argued together in defendant's brief, and, as stated, they are directed toward the sufficiency of the evidence to sustain the judgment.

In *Holdrege v. Livingston*, 79 Neb. 238, this court held: "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." In that case it was further said: "Where a party leaves his domicile with the avowed intention of establishing some

specific new abode, the inquiry must follow him to such new domicile, but * * * there is a total lack of any evidence that Elijah Noyes * * * did in fact establish any new residence or place of abode."

In the case of *McLaughlin v. Sovereign Camp, W. O. W.*, 97 Neb. 71, after quoting from *Holdrege v. Livingston, supra,* this court further held: "In such case the presumption is that the absentee died during the first seven years of his unexplained absence. There is no presumption that his death occurred at any particular time during said period."

The holding of this court in the case of *Rosencrans v. Modern Woodmen of America,* 97 Neb. 568, is: "Where absence of the person insured is shown to have continued for seven years or more, unaccompanied by circumstances which reasonably account therefor on a theory not involving death, it is sufficiently strong to cast the burden of rebutting it on the party who asserts the continuance of life."

Appellant cites and relies upon the cases of *Thomas v. Thomas,* 16 Neb. 553, and *Maxwell v. Maxwell,* 106 Neb. 689. The facts in both these cases differ from the case at bar, in that there was domestic trouble to such an extent as might well explain the absence of the husband. The appellant seriously contends that the note sent to the plaintiff by registered mail is sufficient to explain the absence of the plaintiff's husband. It contends that the statement, "I have gone wrong down in the office and have lost my job," can mean nothing except that he was short in his accounts and was, therefore, guilty of the commission of a crime. We cannot agree with the construction placed upon that sentence. It might mean any of a number of things that would not be criminal. If, in fact, Fredrikson had been short in his accounts, it had ample opportunity to offer proof of that circumstance. It chose not to do so, but to rely upon the statement above quoted. In fact, counsel for appellant objected to any inquiry as to

whether or not there was a shortage in Fredrikson's accounts. This objection was sustained by the court.

Complaint is also made that plaintiff did not call all of Fredrikson's intimate friends or some member of the Y. M. C. A. and of St. Mary Magdalene Church, of which organizations he was a member, to show that nothing had been heard of Fredrikson. We cannot agree that it was necessary for plaintiff to do this or to take the depositions of the living members of his family in Germany. When it was shown that his wife, his sister-in-law, and one of his best friends had not heard from him for a period of more than seven years, this was sufficient to make out a *prima facie* case. Plaintiff was not required to produce all the cumulative evidence available. Defendant elicited the names and whereabouts of the witnesses it complains were not called and was in a position to procure their testimony, if it would avail anything to the defense. It is quite apparent that the appellee made as intensive a search as her limited funds would permit and the same limitation undoubtedly accounts for the restricted number of witnesses called by her.

The judgment of the trial court appears to be sustained by the evidence and is affirmed. Upon application appellee is awarded an additional attorney fee for services in this court in the sum of $200.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS & MERCHANTS BANK OF DESHLER, APPELLEE: SCHOOL DISTRICT NO. 60, INTERVENER, APPELLANT.

FILED FEBRUARY 27, 1934. No. 28807.

1. **Schools and School Districts.** School district treasurer may lawfully deposit school district funds in a bank, duly designated as a depository, pursuant to the provisions of sections 77-2525 and 77-2526, Comp. St. Supp. 1933.
2. **Banks and Banking.** Deposit of school district funds in a duly

designated depository, in the absence of special agreement to the contrary, constitutes a general deposit.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

P. I. Harrison and *W. T. Thompson,* for appellant.

F. C. Radke, Barlow Nye, Grady Corbitt and *Thomas J. Keenan, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

GOOD, J.

This is a proceeding to have a deposit in a state bank, now insolvent, adjudged to have been held by the bank as a trust fund and entitled to be paid out of the assets of the insolvent bank prior to the claims of general depositors.

The Farmers & Merchants Bank of Deshler became insolvent, and proceedings were instituted in the district court for Thayer county for winding up its affairs. A receiver was appointed. At the time the bank closed School District No. 60 of Thayer county had a deposit in said bank of $7,808.89. The receiver of the bank classified the deposit as entitled to the status of a general deposit. The school district intervened in the proceeding and filed a petition asking to have the deposit adjudged to be a trust fund. The trial court denied the prayer of intervener, and it has appealed.

There are numerous decisions rendered by this court holding to the effect that there is no authority of law for the deposit of school funds in a bank, and that, if a deposit of such funds is made in a bank, with knowledge by it of the character of the funds, it will be held to hold the funds in trust for the school district, and, upon insolvency of the bank, the deposit shall be treated as a trust fund. *State v. Midland State Bank,* 52 Neb. 1; *Lincoln Nat. Bank & Trust Co. v. School District,* 124 Neb. 538; *State v. Bank of Otoe,* 125 Neb. 414.

The basis for those decisions was that there was no statutory or other authority which permitted school district officers to deposit school funds in a bank. However, in 1931, sections 77-2525, 77-2526, and 77-2527, Comp. St. Supp. 1933, were enacted. These sections provide:

"77-2525. That any school district treasurer or township treasurer may deposit the money received or held by him by virtue of his office in some state or national bank situated in such school district or township or in some nearby city or village which has been approved as such depository by the governing body of such school district or township.

"77-2526. Any such banks may apply for the privilege of keeping such moneys. All such deposits shall be subject to payment on check when demanded by the district or township treasurer. It shall be the duty of the school district board or township board to act upon such application.

"77-2527. No such treasurer shall be liable on his bond for money on deposit in a bank and by direction of the proper legal authority."

The record discloses that the Farmers & Merchants Bank of Deshler made application to the school board of School District No. 60, Thayer county, for the privilege of becoming a depository for the school district funds, and that the school board, by resolution, designated the bank as a depository for its school district funds. It appears that the deposit was made in strict accordance with the sections of the statute above quoted.

Intervener contends that the sole purpose of those sections was to relieve school district and township treasurers from liability upon their official bonds, where funds in their custody had been deposited in a bank pursuant to the authority of the governing body of the district or township. We cannot concur in this view. Prior to the enactment of the sections quoted, it was unlawful for a school district treasurer to deposit school funds in a bank. After the enactment of those sections it became lawful

for him so to do, provided the bank was first designated as a depository.

Intervener contends that, notwithstanding the sections quoted, the funds still retained their character as trust funds and that the bank held the funds only for safekeeping, and, upon its insolvency, the district was entitled to a return of the funds. This contention seems to be untenable. There was nothing in the nature of an agreement to show that the deposit was special or made for a specific purpose. It was subject to check from time to time, as the treasurer of the district might demand. Under these circumstances, it seems clear that the deposit was general and not special, nor one for a specific purpose.

We conclude that school district treasurers may lawfully deposit school district funds in a bank, duly designated as a depository, pursuant to the provisions of sections 77-2525, 77-2526, and 77-2527, Comp. St. Supp. 1933, and that a deposit of school funds in a duly designated bank, in the absence of special agreement to the contrary, constitutes a general deposit.

It follows that the judgment of the district court is right and it is

AFFIRMED.

GEORGE C. LYONS, APPELLEE, V. HARMON B. AUSTIN, APPELLANT.

FILED FEBRUARY 27, 1934. No. 28833.

1. **Exemptions.** Exemption from execution or attachment of wages of a judgment debtor is controlled by section 20-1559, Comp. St. 1929.
2. ———. Ninety per cent. only of the wages due a judgment debtor is exempt from garnishment in aid of execution on a judgment rendered for other than necessaries.
3. **Appeal.** A defense, not submitted to the trial court nor disclosed by the record, cannot be considered by this court on appeal.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

Allen G. Fisher, Charles A. Fisher and *J. E. Porter,* for appellant.

E. D. Crites and *F. A. Crites, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ.

GOOD, J.

This appeal arises out of an order in a garnishment proceeding in aid of execution. The order found that 10 per cent. of the amount of wages owing the debtor by the garnishee was not exempt and was applicable to the judgment of plaintiff. Austin, the judgment debtor, has appealed.

From the record it appears that some time previous to the present proceeding plaintiff had obtained a judgment against the defendant; that execution had been issued thereon and returned unsatisfied; that he then filed an affidavit for garnishment in aid of execution which was served upon the Chicago & Northwestern Railway Company. That company answered that it had in its possession certain sums as wages due the defendant for services as an engineer. The defendant filed an inventory of his personal property, showing that the total amount of his personal property, other than the wages due him, did not exceed $25, and alleged that he owned neither land, town lots, nor houses subject to exemption as a homestead, and claimed the total amount of his wages as exempt from attachment or garnishment. It was stipulated that the judgment in favor of plaintiff was not rendered for necessaries furnished the defendant or his family.

The trial court found that the debtor was the head of a family, but, nevertheless, that his wages, to the extent of 10 per cent., were subject to garnishment and should be applied towards the payment of plaintiff's judgment,

but that 90 per cent. of the wages were exempt and should be applied according to the direction of the defendant debtor. The only question is whether the 10 per cent. of the wages was exempt from attachment or garnishment.

Plaintiff cites and relies upon *Jones v. Union P. R. Co.*, 84 Neb. 121, and *Woolfson v. Mead*, 96 Neb. 528. Those cases were decided on the statute as it then existed. Section 521 of the Code then provided: "All heads of families who have neither lands, town lots, or houses subject to exemption as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property." Comp. St. 1909, sec. 7092. But subsequently that section was amended and now appears as section 20-1553, Comp. St. 1929, and reads as follows: "All heads of families who have neither lands, town lots or houses subject to exemptions as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property, except wages: * * * The provisions of this section shall not, in any manner, apply to the exemption of wages, that subject being fully provided for by section 546 of this Code." Section 546 of the Code now appears as section 20-1559, Comp. St. 1929, and is as follows: "The wages of all persons who are heads of families, in the hands of those by whom such persons may be employed, both before and after such wages shall be due, shall be exempt from the operation of attachment, execution and garnishee process to the extent of ninety per cent. of the amount of such wages."

It is apparent that the cases cited above and relied upon by defendant are not applicable under the present provisions of the statute. It appears that the 500-dollar exemption in lieu of a homestead may include wages due, or to become due, to the extent of 90 per cent. thereof only, and wages in excess of 90 per cent. are not exempt from garnishment.

Defendant contends that plaintiff's judgment was discharged by an adjudication of defendant's bankruptcy.

There is attached to the record what purports to be a certificate by the clerk of the United States district court for the district of Nebraska, certifying to an order, entered in that court, adjudicating one, named Harmon B. Austin, bankrupt; but such certificate is not contained in, nor any part of, the transcript in the district court or in the bill of exceptions. Whether plaintiff's judgment was extinguished by bankrupt proceedings was a matter that should have been submitted to the trial court. Not having been submitted to the trial court, it cannot here be considered, since the cause is here for review only of the proceedings of the district court.

The finding and judgment of the trial court appear to be in strict conformity with the present law applicable to the facts presented by the record.

The record seems to be free from prejudicial error. Judgment

AFFIRMED.

E. H. LUIKART, RECEIVER, APPELLANT, V. J. E. PAINE ET AL., APPELLEES.

FILED FEBRUARY 27, 1934. No. 28843.

1. **Banks and Banking**: LIABILITY OF STOCKHOLDERS. Constitutional double liability of stockholders in banking corporations was, prior to the amendment of 1930, a secondary liability to be enforced only after assets had been exhausted and the amount due on liability had been judicially determined.
2. ———: ———. Stockholders' double liability in banking corporations is contractual obligation and by construction constitutional provisions in effect at the time of purchase of corporate stock are material parts thereof.
3. **Constitutional Law**: CONTRACTS: IMPAIRMENT. State Constitution changing procedure in suit on contractual liability does not impair obligations of contract and is applicable to existing contracts.
4. **Banks and Banking**: LIABILITY OF STOCKHOLDERS. The nature and extent of bank stockholders' double liability is determin-

able under constitutional provisions extant when stock is purchased.

5. ———: SUIT AGAINST STOCKHOLDERS: DISMISSAL. Suit against stockholders to recover double liability on bank stock purchased prior to 1930 amendment (Const. art. XII, sec. 7), brought before corporate assets exhausted and exact amount justly due judicially ascertained, is premature and should be dismissed.

APPEAL from the district court for Logan county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

F. C. Radke, Barlow Nye, G. E. Price and *Bert L. Overcash,* for appellant.

Squires, Johnson & Johnson and *Henry E. Dress, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and MEYER, District Judge.

DAY, J.

This is a suit to collect the constitutional double liability of stockholders in the Farmers State Bank of Stapleton. The trial court decreed that the suit was prematurely brought, because the assets of the bank had not been exhausted, and dismissed the cause of action. The receiver appeals.

The Stapleton bank was organized in 1925, when all the capital stock was subscribed and purchased. None of the stock has been held by the bank since organization. At the time of the purchase of the stock, the constitutional stockholders' double liability was provided as follows:

"Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder," etc. Const. art. XII, sec. 7.

"In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall

have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." Const. art. XII, sec. 4.

These provisions have been construed together for the determination of the stockholders' liability in banking corporations. The constitutional double liability of stockholders in banking corporations was, prior to the amendment of 1930, a secondary liability to be enforced only after assets had been exhausted and the amount due on liability had been judicially determined. *State v. German Savings Bank,* 50 Neb. 734; *Farmers Loan & Trust Co. v. Funk,* 49 Neb. 353; *Bodie v. Pollock,* 110 Neb. 844; *State v. Farmers State Bank,* 113 Neb. 497; *Rogers v. Selleck,* 117 Neb. 569.

Stockholders' double liability in banking corporations is contractual obligation and by construction constitutional provisions in effect at the time of purchase of corporate stock are material parts thereof. *Allen v. White,* 103 Neb. 256; *Brownell v. Adams,* 121 Neb. 304; *Bourne v. Baer,* 107 Neb. 255; *Rogers v. Selleck,* 117 Neb. 569. This has been the holding in so many cases that it is impractical to cite all of them. It is the general rule. 14 C. J. 843.

In 1930, section 7, art. XII of the Constitution, was amended to read as follows (the change is shown in italics): "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing *or existing* while he remains such stockholder, and all banking corporations shall publish quarterly statements under oath of their assets and liabilities. *The stockholder shall become individually responsible for the liability hereby imposed, immediately after such banking corporation, or banking institution shall be adjudged insolvent, and the receiver of said corporation or institution shall have full*

right and lawful authority, as such receiver, forthwith to proceed by action in court to collect such liability; and the provisions of section 4, article XII, of the Constitution of the state of Nebraska shall not be construed as applying to banking corporations or banking institutions." Comp. St. Supp. 1933.

It is argued that this merely changes the remedy for an existing substantive right. In *Luikart v. Bunz,* 125 Neb. 867, we held that the receiver could bring a suit to recover stockholders' liability for the benefit of all the creditors; that the provision authorizing the receiver to maintain the suit was remedial. But it was also held that, prior to the 1930 amendment, stockholders' liability could not be enforced until the assets had been exhausted and the amount of the debts had been judicially determined. In that case, the assets had been exhausted and the amount then due creditors had been judicially determined.

The precise question presented here is the nature of the obligation created by the purchase of bank stock in 1925. The contractual obligation created was with respect to then provisions of the Constitution. It requires drawing a line of demarcation between substantive and adjective law. Provisions for the enforcement of an existing substantive right do not of course impair vested rights. Examples of such provision relate to who shall bring suit for benefit of all creditors; to which court jurisdiction shall be given; and other matters of procedure. State Constitution changing procedure in suit on contractual liability does not impair obligations of contract and is applicable to existing contracts.

However, amendment to the Constitution, changing the substantive rights of stockholders in banking corporations where the obligation was created by the purchase of stock prior to the adoption of the amendment, is not applicable. The contractual obligation was determined by the constitutional provision existing at the time of purchase. To permit such a change of contract would violate section 10,

art. I of the Constitution of the United States. The nature and extent of bank stockholders' double liability are determinable under constitutional provision extant when stock is purchased.

When the defendants in this case purchased their stock in 1925, their liability was a secondary obligation which could only accrue after the corporate assets had been exhausted and the amount then due creditors had been judicially determined. The obligation cannot be changed by subsequent constitutional amendment changing the obligation to a primary one imposed immediately upon adjudication of insolvency. But this amendment, if applicable to stock purchased prior to its adoption, would materially change the contractual liability. Therefore, the liability in this case must be determined under the Constitution as it existed prior to the amendment of 1930. The assets had not been exhausted in the instant case, and the amount necessary to pay all the creditors had not been judicially determined. The suit was prematurely brought.

The trial court made comprehensive and exhaustive findings of fact which it is unnecessary to review and a discussion of which is here unnecessary and improper, since the suit is dismissed as prematurely brought, and no other fact is here determined.

AFFIRMED.

BERTHA THOMAS, APPELLEE, V. ALBERT HASPEL, APPELLANT.

FILED FEBRUARY 27, 1934. No. 28790.

1. **Pleading:** AMENDMENT. It is usually a matter within the sound judicial discretion of the district court to allow, or to refuse to allow, a pleading to be amended to conform to the evidence; and, in order to predicate error in allowing such amendment, prejudice to a party as a result thereof must appear from the record.
2. **Negligence:** INSTRUCTIONS. Where, in an action to recover for

personal injuries, the jury are properly instructed as to the burden of proving the negligence charged as a proximate cause of the injury, failure to further instruct on unavoidable accident not error in the absence of request therefor.

3. **Trial:** INSTRUCTIONS. Requested instruction, giving undue prominence to a portion of the testimony by special reference thereto and commenting on its weight, properly refused.
4. **Evidence:** NONEXPERT EVIDENCE: PERSONAL INJURY. Nonexpert witnesses are competent to testify as to circumstances and conditions that any person of ordinary intelligence might observe, and such witnesses may testify whether a person who has been injured, and with whom they were familiar, appeared to be suffering pain, or nervousness, the appearance of her injuries and similar matters observed by them tending to show the nature and extent of the injuries. *Struble v. Village of DeWitt*, 89 Neb. 726.
5. **Appeal.** Verdict based on conflicting evidence will not be disturbed on appeal unless clearly wrong. *Anderson v. Lotman*, 124 Neb. 795.
6. **Damages.** Evidence examined, and *held*, verdict of $3,000 not excessive.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

E. H. Evans, J. T. Keefe and *Urban Simon*, for appellant.

Halligan, Beatty & Halligan and *Milton C. Murphy, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

ELDRED, District Judge.

Action to recover for injuries sustained by plaintiff, Bertha Thomas, due to the alleged negligence of the defendant, Albert Haspel, in the operation of his automobile. There was a verdict for plaintiff for $3,000. Motion for a new trial was overruled, and judgment entered on verdict. Defendant appeals.

Error is assigned in permitting appellee to amend her petition during trial to conform to the proof. The al-

legations of the petition, as originally filed, with reference to injuries, were: "That she sustained an incised wound over the left eye, several inches in length, that her nose was broken, that she suffered a cut through her lower lip, received a severe injury to the back of her neck and to her right shoulder and suffered a broken left hand, * * * that she suffered an attack of traumatic neurosis." During the trial, and after appellee had rested her case, she asked permission to amend her petition by adding thereto the following: "Plaintiff further alleges and says that she suffered a permanent, lasting and severe injury to her lower back and hip which has resulted in her having a condition known as traumatic arthritis."

The plaintiff, appellee, testified fully as to her injuries, including injuries to her back, hip and spine, and no objection was made thereto by appellant. It was not until during the examination of Dr. Willis, called as a witness by appellee, that the appellant first objected and raised the question that "evidence as to injuries to the back is not within the issues made by the pleadings." The presiding judge, when amendment was requested, announced that he would refrain from ruling thereon at that time, and wait until further along in the case to see to what extent the defendant has been permitted to meet the issues raised relative to the injuries to the back. The court, at the same time, ordered "that the plaintiff (appellee) submit to a further physical examination, not only as to the back, but any other examination of her injured parts." A recess was thereupon taken for several hours and appellee submitted herself to an X-ray examination by doctors selected by appellant. On behalf of appellant the doctors making the X-ray examination were called and testified, and it appears from the record that two of said doctors in April, 1932, after the commencement of suit, at procurement of the appellant, and consent of attorney for appellee, examined appellee as to the injuries to her back. They were given full and free opportunity to make such examination by appellee, and in their opin-

ion she was suffering from injuries thereto at that time. The trial was in December, 1932.

After appellant had offered his evidence and rested, he moved for an order that he be permitted to have a further X-ray examination made of appellee. The court, in ruling on this request, announced: "The record discloses that the defendant made an examination of the plaintiff some time last April, which was at that time performed through the doctors that were sent for the examination by the defendant. There being some kind of complaint about the back being injured during the trial, the court has taken a recess of four or five hours, and the plaintiff has submitted herself to X-ray examination. Under the condition of the record, * * * the motion for any further continuance is overruled."

Rebuttal evidence having been offered and both parties having rested, the court announced: "In view of the facts shown in the record relative to the doctors acting on behalf of the defendant having been notified of the claim of the plaintiff that she had suffered an injury to her back at the time of their examination in April, of 1932, and in view of the opportunity that has been given during the trial to the defendant to make X-ray plates of the lumbar region of the plaintiff's back and spine, the evidence as given relative to any injuries thereto, and in view of the fact that the petition as it was originally drawn having made a claim for damages on account of traumatic neurosis that might arise from injuries to various portions of the body, the request of the plaintiff to amend her petition, heretofore made, * * * is allowed."

It seems, under the allegations of the petition before amendment, that, as a result of the injuries pleaded, the plaintiff "suffered an attack of traumatic neurosis," evidence of that condition in any portion of the body might have been admissible, and an amendment may not have been necessary for that purpose. However, the permitting of the amendment was well within the limits of judicial discretion and in furtherance of justice. The

court cautiously refrained from granting the request until it appeared that appellant would not be prejudiced thereby. The ruling not appearing prejudicial to the rights of the appellant was not erroneous.

Our Code provides that the court may, either before or after judgment, in furtherance of justice, permit an amendment to any pleading correcting a mistake in any respect, or by asserting allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading to the facts proved. Comp. St. 1929, sec. 20-852.

The granting of permission to amend a pleading during trial to conform to the proof is a matter within the sound judicial discretion of the trial court, and unless it clearly appears from the record that there was an abuse of discretion, and a party has thus been deprived of the opportunity to make his case or defense and thereby damaged, this court will not, on appeal, interfere with such ruling. *Blakeslee v. Van der Slice,* 94 Neb. 153; *Miller Rubber Products Co. v. Anderson,* 123 Neb. 247; *Omaha & R. V. R. Co. v. Moschel,* 38 Neb. 281.

Complaint is made that the trial court erred in failing to instruct jury on theory of unavoidable accident. No instruction to that effect was requested. The court fully and correctly instructed the jury as to the issues, the burden of proof on plaintiff, and that if not satisfied by a preponderance of the evidence of negligence on the part of defendant, as a proximate cause of injury, plaintiff could not recover; or if evidence evenly balanced, or preponderated in favor of defendant, then verdict should be for the defendant. Also the rule governing contributory and comparative negligence was correctly stated to the jury. This was sufficient as to that phase of the case. If further instruction as to mere accident or unavoidable accident was desired, they should have been requested.

Complaint is also made of failure of court to give instruction No. 3, requested by defendant, "That the mere skidding of an automobile is not an occurrence of such

uncommon or unusual character that, unexplained, it can be said to furnish evidence of negligence in the operation of a car;" and further, "If you find that the defendant skidded in this case without any other act of negligence on his part, then your verdict will be for the defendant." Skidding of automobile was not an element of negligence charged in the petition; but the skidding of an automobile would be a circumstance which might be considered by the jury along with all the other circumstances disclosed by the evidence in determining whether the defendant was guilty of negligence in the particulars charged. By special reference to such testimony it would have been given undue prominence. It was for the jury to say what weight should be given to the circumstance of skidding when considered with all the other facts and circumstances shown by the evidence bearing upon the question of negligence.

Complaint is made of the refusal of the trial court to strike out all of the evidence relating to neurosis, for the alleged reason that no competent evidence was offered tending to prove the same. No reference is made to the pages of the bill of exceptions where the evidence complained of will be found. Some evidence that might bear on that subject was given by a doctor called as a witness by the appellee; also by doctors who testified on behalf of appellant. Why their evidence was not competent is not pointed out. Several nonexpert witnesses were also called by the appellee and testified as to the general physical condition of appellee; her suffering pain and her nervous condition. Much of this testimony, if not all, was competent. *Struble v. Village of DeWitt,* 89 Neb. 726; *Kubicek v. Slezak,* 119 Neb. 542. If some specific portion of the evidence was objectionable, particular attention of the trial court and this court should have been directed thereto.

Insufficiency of the evidence to sustain verdict is urged. On November 26, 1931, appellee, Bertha Thomas, while driving east on Lincoln highway, at a point between Max-

well and Brady, had some difficulty in the handling of her car, which resulted in getting her car into the ditch on the north side of the grade. One King, driving west, whom appellee had just met, observing appellee's accident, backed his car up and stopped it on the north edge of pavement, headed west, nearly due south of appellee's car. Jerry Snyder, also traveling west, drove up at about the same time and also stopped his car on north edge of pavement, about fifteen feet to the rear of the King car. Mr. King got out of his car and the appellee got out of her car and, coming onto the grade, was talking to King about where she could get help to get her car out of the ditch. She had been in no manner injured up to that time. She and King were standing between the King car and the Jerry Snyder car; appellee to the south of King was facing in a northerly direction standing directly back of the left fender of the King car, about a foot north of the south side of the car. About that time another car came up from the east, driven by one R. G. Snyder. He testified that, as he drove up, the car in the ditch was headed toward the grade, the back end down in the ditch, just about between the two cars that were up on the paving; observed a man and woman there, behind the west car; further stated, "Well, I was coasting to a stop there, and about the time I had got even with the east car, another car appeared from the east coming quite rapidly, and about the time, or a little before, he got to where I was, he just kind of headed toward me and I whipped into the shoulder to get in the clear all I could. * * * It whipped back the other way, and by that time it was by me and I heard this crash then." As witness passed, appellee was standing a foot or two north of the south side of the King car. Appellee testified, as she stood there talking to King she heard no horn sounded or signal of any kind of approaching car; that she was hit from the back some way and knocked down. King testified Mrs. Thomas was standing right behind his (King's) car; to the north of the south side of the car; the car

came from the east, hit her and knocked her down. Swiped alongside of his car and jimmied the hub on left rear wheel, and on spare wheel on running board; rear fender was bent in and broken to the body; jimmied the running board. It was Haspel's (appellant's) car that struck the plaintiff. Haspel's car ran 150 feet after it struck King's car. Haspel told witness, in order to keep from hitting another car head-on, he had to turn in that direction. He did not see the other car coming until he turned around these cars. Witness saw car from the east that went by at that time.

Appellant in his own behalf testified: Saw the cars stopped about a quarter of a mile down the road; slowed down and came to a stop behind Mr. Snyder's car. There was one truck and three cars coming from the east and I was compelled to stop; after they had passed I went on south side of both cars, to come west. Just about by Mr. Snyder's car I hit an icy spot and my car swayed over and hit Mr. King's car, my right front fender on his left rear fender; then I slipped sidewise along his car; did not see any people about there at that time; did not know of striking any person with automobile; going eight or ten miles an hour, with car in intermediate gear. Other circumstances were shown by witnesses called by parties to this suit.

Sufficient has been shown to indicate that the evidence was conflicting; and its weight was for the jury. If the evidence offered on behalf of appellee was believed by the jury, they could well have concluded that, under the existing conditions, the appellant was not, in the operation of his car at the time and place in question, exercising care commensurate with the danger and injury reasonably to have been apprehended from a lack of proper prudence. Where a verdict is based on conflicting evidence, it will not be disturbed as against the weight of evidence, unless clearly wrong. *Anderson v. Lotman,* 124 Neb. 795; *Cotten v. Stolley,* 124 Neb. 855; *Schwerin v. Andersen,* 107 Neb. 138; *Bainter v. Appel,* 124 Neb. 40.

Finally, it is contended that the verdict is excessive. There is evidence that appellee received the injuries alleged in her petition, which have heretofore been set out. This is mostly uncontroverted, except as to the injuries to her back and spine, and the effect thereof; some of the injuries are of a permanent nature; left a deformity of the nose; she has suffered much pain and at the time of the trial still complained of pain from the injuries received; was nervous; unable to sleep well nights; had difficulty in climbing stairs; unable to use injured hand, without pain, and her physical activities are interfered with. We conclude the evidence as to injuries sufficient to sustain the amount of the verdict. No prejudicial error appearing, the judgment of the trial court should be, and is

AFFIRMED.

ETHYL LAFLEUR, ADMINISTRATRIX, APPELLANT, V. WILLIAM POESCH ET AL., APPELLEES: WESTERN PUBLIC SERVICE COMPANY, APPELLANT.

FILED FEBRUARY 27, 1934. No. 28678.

1. **Trial**: DIRECTION OF VERDICT. "If there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. In reviewing such action, this court will regard as conclusively established every fact which the evidence proves or tends to establish, and if, from the entire evidence thus construed, different minds might reasonably draw different conclusions, it will be deemed error on the part of the trial court to have directed a verdict thereon." *Bainter v. Appel*, 124 Neb. 40.
2. **Automobiles**: NEGLIGENCE. It is required by sections 39-1122 and 39-1165, Comp. St. Supp. 1931, that, during the period of one-half hour after sunset until one-half hour before sunrise, a red light shall be displayed on the rear of a truck, which, with its load, is 80 inches or more in width, and also a red light at the end of a load thereon when the same extends more than 4 feet beyond the rear of the truck. *Held*, a failure to

comply with these requirements of said statutes is not actionable negligence as a matter of law, but evidence of negligence to be taken into consideration with all the other facts and circumstances in evidence in determining whether or not negligence is established thereby.

3. ———: PARKING. Section 39-1154, Comp. St. Supp. 1931, prohibiting parking or to leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of the business or residence district, when it is practicable to leave such vehicle off the paved or improved or main traveled portion of the highway, does not, by an express exception contained therein, apply to any automobile which is disabled, while on the paved highway, in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position.
4. **Negligence.** Under the facts set out in the opinion, *held* that the questions of negligence and contributory negligence and whether the deceased was guilty of such contributory negligence as would bar a right of recovery under the comparative negligence statute were issues which should have been submitted to the jury for their determination.
5. **Master and Servant.** "For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible." *Stone v. Hills*, 45 Conn. 44.
6. ———. In actions wherein it is sought to hold the master liable for the wrongful act of his servant, each case must be determined with a view to the surrounding facts and circumstances, the character of the employment and the nature of the wrongful act. Whether the act was or was not such as to be within the scope of his employment, in the execution of his master's business, is ordinarily one of fact for the determination of the jury.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Reversed.*

Morrow & Morrow, for appellants.

Mothersead & York and *Wright & Wright, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

HASTINGS, District Judge.

This action was brought by Ethyl LaFleur, as administratrix of the estate of Harry C. LaFleur, deceased, against William Poesch and the Cudahy Packing Company to recover damages for alleged negligence resulting in the death of her husband, Harry C. LaFleur. The Western Public Service Company, by whom Harry C. LaFleur was employed at the time of the accident which resulted in his death, paid compensation under the workmen's compensation act to his widow and was joined as a defendant so that it might be subrogated to the rights of the plaintiff for such sums as it had paid or might thereafter pay under said act. At the close of plaintiff's evidence the court sustained separate motions of the defendants, Poesch and the Cudahy Packing Company, for a directed verdict. From the judgment entered on the verdict the plaintiff and the Western Public Service Company appeal.

The principal error assigned is that the court erred in directing a verdict for the defendants. It is contended by plaintiff that the evidence does not show that the decedent was guilty of such contributory negligence as would bar a right of recovery under the comparative negligence statute. The correctness of the ruling of the trial court will be tested in accord with the rule announced by this court in *Bainter v. Appel,* 124 Neb. 40, wherein it is stated:

"If there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. In reviewing such action, this court will regard as conclusively established every fact which the evidence proves or tends to establish, and if, from the entire evidence thus construed, different minds might reasonably draw different conclu-

sions, it will be deemed error on the part of the trial court to have directed a verdict thereon."

A consideration of the question involved necessitates a brief outline of the facts as disclosed by the evidence. The deceased, Harry C. LaFleur, at the time of his death and for several years prior thereto, was in the employ of the Western Public Service Company as a construction or line foreman. He and the men who worked under his direction had their headquarters at Scottsbluff. A truck was used for the purpose of conveying the men to and from their work and, also, to carry the equipment and material required in performing the work. On February 25, 1932, the deceased and his crew of three men, having completed their work, started at about 4:15 p. m. in the truck for Scottsbluff. When they reached a point on the main paved highway between Mitchell and Scottsbluff, about 4 miles east of Mitchell and 6 miles west of Scottsbluff, the motor of the truck became so disabled that the truck could not be driven on its own power. This happened at about 5:20 p. m. when it was still day-light. The truck in question was a large heavy truck, with dual wheels in the rear, with brackets on the sides for carrying iron pipes or poles used in the performance of the work of repairing or constructing electric lines. At the time the truck became disabled there were being carried on the brackets on the left side thereof 4 iron pipes which were 4 or 5 inches in diameter, three being 18 feet in length; there were also pipes of like size in brackets on the right side of the truck. The pipes 18 feet in length extended from near the door of the cab to about 6 feet to the rear of the body of the truck. The body of the truck was 6 feet and 4 inches in width and, with brackets loaded, over 80 inches in width. After the truck stopped, the starter was used to remove it from the pavement, as far as it could be removed by the use of the starter. This left the left wheels of the truck 2 feet and 2 inches on the pavement, the right wheels of the truck were off the pavement resting upon the shoulder of the highway,

which at that point was about 4 or 5 feet in width, with its sides sloping into a barrow pit about 4 feet in depth. The right wheels of the truck were between one foot and one foot and a half from the south edge of the shoulder of the highway. The truck, as parked, faced in an easterly direction. The pavement at the point where the truck was parked was 20 feet in width, leaving a clear space between the north side of the truck and the north edge of the pavement of nearly 18 feet. About 15 or 20 minutes after the truck became disabled the deceased sent one of the crew to Scottsbluff to procure a truck to pull the disabled truck to said town. It was still daylight. The man returned with the truck very shortly after the accident, which happened about 6:30 p. m. At the rear end of the poles there was a red flag. It was the intention of the deceased to reach Scottsbluff before it became dark and he would have done so had not the truck been disabled. The truck was not equipped with any lights except two headlights. When it began to get dark the two headlights were turned on, and not having any lights on the rear of the truck or at the end of the protruding load, the deceased directed that a blow pot, that was in the truck, be lighted and placed to the rear of the load. The lighted blow pot was placed on the pavement about 8 feet to the rear of the end of these poles. It gave a pinkish light about 10 inches in height, in size comparable to the lights used by the highway department to warn of some obstruction on or defect in the highway.

Shortly after dark a car was approaching from the east and also one from the west. The one from the west being driven by the defendant Poesch. Both of these cars had their headlights burning. The car of the defendant Poesch, when first noticed, was about a half mile distant from the truck and the other car approaching from the east somewhat nearer. The lighted blow pot was burning during all the time that the defendant Poesch was approaching the truck.

The deceased and two others of the crew were, at the

time those cars were approaching, standing on the left side of the truck near the cab. As the cars drew nearer it became apparent that they were going to pass at or near the point where the truck was located. Upon observing this, one of the men warned the others that they should get out of the way, and two of them immediately ran around to the front of the truck. Both were injured. The deceased remained where he was. As the two men reached the front of the truck, the car driven by the defendant Poesch struck the iron pipes projecting to the rear of the left side of the truck, one of which struck the deceased on the head and caused his death. One of the witnesses estimated the speed of the Poesch car as it approached the truck at 50 to 55 miles an hour. It appears from the marks upon the pavement the brakes on the Poesch car had been set about opposite the rear wheels of the truck. After striking the pipes it went around to the left of the truck, into the ditch on the right-hand side of the pavement. The distance from where the brakes were set to where the car went into the ditch was 56 feet and 8 inches. After going into the ditch on the south side of the pavement it traveled 23 feet east along the course of the ditch and turned over on its side.

It is agreed by all the witnesses that the Poesch car was being driven at a high rate of speed before and at the time it struck the pipes and probably a part of the truck. This fact may be properly inferred from the distance it traveled with the brakes set before turning over in the ditch. The Poesch car before striking the pipes ran over and demolished the lighted blow pot. For several miles west of the point where the truck was standing the highway was level with nothing to obstruct the vision of one driving east. At the time of the accident the atmospheric conditions were normal.

Section 39-1174, Comp. St. Supp. 1931, provides in part: "(a) Every motor vehicle upon a highway within this state during the period from a half hour after sunset to

a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of 200 feet ahead, shall be equipped with lighted front and rear lamps."

Section 39-1176, Comp. St. Supp. 1931, provides in substance: The head lamps of motor vehicles shall be so constructed, arranged and adjusted that they will at all times at night, under normal atmospheric conditions, and on a level road, produce a driving light sufficient to render clearly discernible a person 200 feet ahead.

Nothing to the contrary appearing in the evidence, it will be presumed that the headlights of the Poesch car complied with the statute, and, the atmospheric conditions being normal and the road level, that, if he had kept a proper lookout, he would have seen the truck on the pavement at least 200 feet before the collision, he would have observed the light upon the pavement at a much greater distance and would have been warned thereby that there was some obstruction on or defect in the highway at or near where said light was located. No explanation or reason appears in the evidence as to why the defendant, Poesch, with his car lighted as required by these statutes, could not see the truck or the load protruding therefrom, nor why he did not see the warning light or, if he did, why he did not heed the warning in time to have avoided striking the truck or the protruding pipes, or why, by turning to the left, he could not have avoided the collision. Giving no heed to the truck, which must have been clearly discernible within the radius of his lights, or to the warning light upon the pavement, he drove at an excessive rate of speed over the light and into the pipes protruding at the rear of the truck and, probably, into the truck.

We think, in the matters pointed out, there is such evidence of negligence on the part of said defendant as would warrant a finding of gross negligence on his part, or, so far as inferences may be drawn from the evidence

adduced, would warrant a finding that his negligence was the proximate cause of the injury.

It is contended by counsel for defendants that, notwithstanding the negligence of the defendant Poesch, the deceased, LaFleur, was guilty of contributory negligence which was more than slight in comparison with the negligence of said defendant. The alleged acts of contributory negligence upon which such contention is based are: (a) In leaving the truck standing in part upon the paved highway; (b) in not displaying at the rear of the truck, it being more than 80 inches in width with its load, a red light; (c) failure to display at the end of the load a red light; (d) failure to remove the load from the truck; (e) failure of the decedent to remove himself from a place of obvious danger; (f) failure to go or send some member of the crew to the rear of such truck to warn approaching motorists of the presence of the truck thereon.

It is urged that the leaving of the truck partly upon the pavement was in violation of section 39-1154, Comp. St. Supp. 1931, which, so far as material, provides: "(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of said highway. * * * (c) The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position."

The statute by an express exception does not apply to a vehicle which is disabled while on the paved or improved or main traveled portion of any highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position. In the case of *Grubbs v. Grayson,* 165 Wash. 548, it was

said by that court, in construing a statute very similar to the one under consideration: "The statutes are not violated if there is proper excuse or a necessity for stopping an automobile upon the highway, and a reasonable effort is made to get it entirely off the traveled portion of the road or as nearly so as circumstances will permit." See, also, *Menge v. Manthey*, 200 Wis. 485.

Under the evidence in this case we cannot say, as a matter of law, that the decedent was guilty of contributory negligence in not removing the truck entirely off the pavement.

The statutes relating to the equipment and display of lights on trucks of the kind involved herein are sections 39-1122 and 39-1165, Comp. St. Supp. 1931. These statutes provide, in substance: Every motor vehicle, including road rollers, road machinery or farm tractors having a width including the load of 80 inches or more shall display during the period from one-half hour after sunset until one-half hour before sunrise and at all other times when there is not sufficient light to render such vehicle clearly discernible, at the rear of such motor vehicle, a red light located at a sufficient distance above the tail light of such vehicle as not to be confused therewith and visible under normal atmospheric conditions for a distance of 300 feet to the rear of said vehicle. Comp. St. Supp. 1931, sec. 39-1122. Whenever the load of any vehicle shall extend more than 4 feet beyond the rear there shall be displayed at the end of such load a red flag not less than 12 inches in length and width, except that between one-half hour after sunset and one-half hour before sunrise there shall be displayed at the end of any such load a red light plainly visible under normal atmospheric conditions at least 200 feet to the rear of such vehicle. Comp. St. Supp. 1931, sec. 39-1165.

It is insisted that the failure to display lights upon the truck and at the rear of its load, as required by these statutes, was negligence *per se*. The law is well settled by the decisions of this court that a violation of statutes

regulating the use and operation of motor vehicles upon the highways is not negligence *per se,* but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby. *Stevens v. Luther,* 105 Neb. 184; *Dorrance v. Omaha & C. B. Street R. Co.,* 105 Neb. 196; *Thomas v. Rasmussen,* 106 Neb. 442; *Taylor v. Koukal,* 107 Neb. 409; *Burkamp v. Roberts Sanitary Dairy,* 117 Neb. 60.

In the case of *Taylor v. Koukal, supra,* we held that the violation of a statute requiring lights to be displayed on motor vehicles in use during the period from one hour after sunset to one hour before sunrise was not negligence in itself. The same rule is also announced in *Burkamp v. Roberts Sanitary Dairy, supra.* The failure on the part of the deceased to have displayed upon the truck and its load lights as required by the statutes under consideration was not negligence in itself, but evidence of negligence to be considered with all the other facts and circumstances in evidence in determining whether the deceased, in fact, was guilty of negligence in that regard.

It is contended by the appellees that the failure to display red lights, as required by these statutes, was gross negligence on the part of the deceased. In support of this contention we are cited to the cases of *Giles v. Welsh,* 122 Neb. 164, and *Monasmith v. Cosden Oil Co.,* 124 Neb. 327. In the latter case we said: "Leaving an unlighted vehicle on highway, on dark night, without any warning, constitutes gross negligence, within the meaning of the comparative negligence statute." The rule announced in those cases does not apply to the facts in this case. The facts in each of the cases show that there were no lights whatever upon the motor vehicles left upon the highways, or any means taken to warn approaching travelers upon the highway of their presence.

Under all the facts in this case, we cannot say that the decedent was guilty of negligence, as a matter of law, in not either going himself or sending some member of

the crew to the rear of the truck to warn motorists approaching from the rear of its presence, or in not removing the pipes from the truck, or in remaining in the place in which he did and not attempting to seek a place of safety. Whether the deceased in all of these matters did or omitted to do what a reasonably prudent man would have done or would not have done under the same or similar circumstances or conditions was a question for the jury. From the facts different minds might reasonably draw different conclusions. From a careful examination of the evidence, we are convinced that the questions of negligence and contributory negligence and whether the deceased was guilty of such contributory negligence as would bar a right of recovery under the comparative negligence statute were issues which should have been submitted to the jury for their consideration.

It is urged by counsel for appellee Cudahy Packing Company that, even if the action of the trial court in directing a verdict in behalf of the defendant Poesch cannot be sustained, its action in directing a verdict in favor of the packing company must be sustained on the ground that the defendant Poesch was not at the time of the accident in the execution of his master's business or acting within the scope of his employment. The contention is that at the time of the accident he was on his way to his home to spend the night for his own convenience. The evidence shows that the defendant Poesch was employed by his codefendant, Cudahy Packing Company, on the 13th day of July, 1931, under a written contract, which, as far as material, provides: "Said employee has this day entered the employ of the said employer to work for said employer from week to week in such capacity and in such manner as said employer may from time to time direct at a salary of $31.50 per week and actual traveling expenses while away from his headquarters town on company business."

The duties of the defendant Poesch were to sell meat, collect accounts, and make adjustments for the company.

His home and headquarters were at Scottsbluff. He worked under the directions of the sales manager for the company, who mapped out his territory. Under the directions of the sales manager he was required to cover his territory each week. The territory included the city of Scottsbluff and the towns west to Wheatland, Wyoming. Under the direction of the company he was required on Wednesday morning of each week to leave Scottsbluff and work as far west as Gurnsey by Wednesday night; Thursday he would go to Wheatland, Wyoming, and back to Torrington, Wyoming, and make the towns back to Scottsbluff. The accident involved occurred on one of his regular trips. His contract with the company created the necessity for travel. To make his territory, as required, the use of an automobile was necessary. Under arrangements with the company he used his own (which he was using on the night of the accident) for which he was required to furnish oil and gas and to pay for its upkeep. For the use of his automobile in the business of the company he was paid 5 cents a mile and in addition thereto he was allowed traveling expenses for meals, hotel bills and telephone expense. During the time of his employment up to the time of the accident he had continually used his automobile in the business of the company, using no other means to make his territory. He occasionally carried samples for the company and at the time of the accident had some bacon in his car, also two or three cartons of cheese which he had taken in on adjustments for the company and which he contemplated reselling for the company. At the time of the accident he was taking this merchandise to Scottsbluff.

On the day of the accident he was returning home after having covered the western part of his territory. Mitchell was the last town he was to work before returning to Scottsbluff. When he arrived at Mitchell on this particular trip the stores were closed so that he was unable to work the town that night. His instructions from the sales manager were to cover the territory with the least

possible expense, and when he was close to Scottsbluff and the expense of going there would be less than staying in some outside town he was to use his own judgment as to whether he should stay in such town or come to Scottsbluff and go back the following day and finish his work there. He had done this at least twice each month before the time of the accident. Under these instructions from his employer he could have stayed in Mitchell that night and worked the town the next morning and the company would have paid his expenses. The expense of staying in Mitchell that night would be from $2 to $2.50 and the expense of coming home and returning to Mitchell in the morning would be about $1. The only witness called by the plaintiff upon this question was the defendant Poesch, and in addition to testifying to the facts set out, he stated that at the time of the accident he was on his way home on a trip for his own convenience so that he might be at home that night.

The general rule of law applicable to this class of cases is accurately and concisely stated in *Stone v. Hills,* 45 Conn. 44, 29 Am. Rep. 635, and is as follows:

"For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible."

Whether the act was done in the execution of the master's business, within the scope of his employment, is a question of fact. The rule cannot aid in the determination of the fact. Each case must be determined with a view to the surrounding facts and circumstances, the character of the employment and the nature of the wrongful act. Whether the act was or was not such as to be within the scope of his employment is, ordinarily, one of

fact for the determination of the jury. 18 R. C. L. 795, sec. 254. "The cases which have arisen upon this subject have from the earliest times been productive of much astute and interesting discussions in courts of law, and eminent judges have differed widely in their decisions. It has always been a matter of extreme difficulty to apply the law to the ever-varying facts and circumstances which present themselves." *Rayner v. Mitchell,* Law Rep. 2 C. P. Div. 357.

Under the facts in this case, had the defendant Poesch arrived at Mitchell on the night of the accident in time to have completed his work, and when on his trip from Mitchell to Scottsbluff the accident had happened, it can hardly be questioned but what he would then have been acting within the scope of his employment and in the execution of his master's business. When he arrived in Mitchell and the stores were closed and he was unable to work the town that evening, he had the authority from his employer to either stay in Mitchell that night or return to Scottsbluff and return to Mitchell the next morning. He was to cover his territory at the least possible expense. To keep down the expense he was required not to stay overnight in Mitchell but to go on to Scottsbluff and return to Mitchell the next morning. Whether he may have had the option to go to his home or stay at Mitchell overnight can make no difference. In either event he was acting on the instructions of his employer, and his act in going from Mitchell to Scottsbluff under the circumstances disclosed by the evidence would support a finding that he was acting within the scope of his employment and in the execution of his master's business.

The argument that he was not so engaged is based upon his testimony that the trip from Mitchell to Scottsbluff was made for his own convenience so that he might be at home that night. This was but a conclusion of the witness. The other facts and circumstances in evidence would warrant a different conclusion. Although the trip might have been taken in part for his own convenience

and his desire to be home that evening, we think the facts shown by the record presented a question for the jury.

Error is also assigned in the exclusion from evidence of a plat of the scene of the accident. From the view we have taken of the case we do not find it necessary to give consideration to this assignment.

For the reasons given, the judgment is reversed and the cause remanded for a new trial.

REVERSED.

HAROLD D. HOOVER ET AL. V. STATE OF NEBRASKA.

FILED MARCH 2, 1934. No. 28967.

1. **Criminal Law**: REVIEW. Only judgments and sentences of the district court upon convictions for felonies and misdemeanors under the Criminal Code may be brought to this court by petition in error. Comp. St. 1929, sec. 20-1912; *Brandt v. State*, 80 Neb. 843.
2. **Municipal Corporations**: ORDINANCES: VIOLATION: REVIEW. A judgment and sentence for the violation of a city ordinance, which does not embrace any offense made criminal by the statutes, partakes of the nature of a civil proceeding to recover a penalty and is reviewable only by appeal.
3. **Criminal Law**: REVIEW. For a review of errors occurring at the trial, it is mandatory that a motion for a new trial be filed within three days after the trial, except for the cause of newly discovered evidence.
4. ———: DISMISSAL. Motion to dismiss petitions in error sustained.

ERROR to the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Dismissed.*

W. A. Ehlers, for plaintiffs in error.

Paul F. Good, Attorney General, Max Kier and *Lloyd E. Chapman, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and MEYER, District Judge.

GOSS, C. J.

Defendants were first found guilty and fined in the municipal court of Lincoln. They appealed to the district court for Lancaster county, where they were tried by the court and found guilty. Each was fined $10 and costs, for which execution was awarded. While there were separate complaints, defendants were tried together. They brought proceedings in error here and the causes were briefed and argued together.

Each defendant gave a surety bond in the district court reciting that he intended to prosecute error proceedings. Each duly filed a petition in error. In their brief they described themselves as plaintiffs in error and the state as defendant in error.

After defendants filed their brief the state moved to dismiss the petition in error and the proceedings for review on these grounds: First, that the actions were civil in nature and reviewable by appeal, and not by error proceedings; second, that defendants had failed to file motions for new trials in the district court. We deferred ruling on the motion until we might hear arguments on the merits.

The complaints contained two counts. The first count charged defendants with violating an ordinance requiring peddlers of merchandise to pay a license fee. Among other things it defined a peddler of merchandise as one who takes orders for present or future delivery. The second count charged defendants with violating another ordinance requiring peddlers of merchandise to pay an occupation tax. That ordinance defined peddlers of merchandise in the same way. Neither ordinance prescribed a penalty other than a fine. They solicited orders for goods which would later be delivered from a stock in Omaha. The business had no interstate features; it was all intrastate in character.

In 1907 the legislature eliminated much confusion by doing away with proceedings in error in all cases except criminal cases. Laws 1907, ch. 162. This has been

brought down to date in section 20-1912, Comp. St. 1929. "Judgments and sentences upon convictions for felonies and misdemeanors under the Criminal Code" are expressly excepted from the procedure for review on appeal. All judgments in causes other than those made felonies or misdemeanors by the criminal statutes are reviewable by appeal.

The first point for decision, therefore, is whether the city ordinances under which defendants were convicted brought defendants within the exception made by the statute so that they may obtain a review as plaintiffs in error. An early decision under the 1907 law came in 1908. *Brandt v. State,* 80 Neb. 843. Defendant was convicted of violating an ordinance prohibiting keeping a saloon open after specified hours or on Sunday. He appealed to the district court, where the appeal was dismissed. He filed a petition in error in this court. Finding that the Criminal Code specified no particular hours during which it is a crime to keep open a saloon, this court sustained an objection to the jurisdiction. The syllabus says: "Under the provisions of chapter 162, Laws 1907, providing for appeals to the supreme court, only judgments and sentences upon convictions for felonies and misdemeanors under the Criminal Code may be brought to this court by petition in error. All other cases must come here by appeal, and notice must be given, either as specified in section 3 of the act, or under the provisions of supreme court rules 33 to 37, inclusive."

Prior to the passage of the 1907 act this court had held in *Peterson v. State,* 79 Neb. 132, that "A prosecution for the violation of a city ordinance, which does not embrace any offense made criminal by the laws of the state, * * * is, in fact, a civil proceeding to recover a penalty, and clear and satisfactory proof that the offense has been committed is sufficient to sustain a conviction. Proof beyond a reasonable doubt is not required." On the point that such a proceeding is civil in its nature, see, also, *Ruffing v. State,* 80 Neb. 555; *Pulver v. State,* 83 Neb.

446; *Cleaver v. Jenkins*, 84 Neb. 565; *Western Union Telegraph Co. v. City of Franklin*, 93 Neb. 704; *Francisco v. State*, 108 Neb. 309; *McLaughlin v. State*, 123 Neb. 861.

It clearly appears that the ordinances in question do not embrace either a felony or misdemeanor under the Criminal Code. The inquiry by the district court (as well as by the municipal court) was as to the violation of a municipal regulation. Its purpose was to recover a penalty. While it had the form of a criminal proceeding it was, in fact, a civil proceeding. Under the rules followed from the beginning, the judgment in such a cause is reviewable here only on appeal, and not by petition in error.

The judgments were severally entered on June 24, 1933. Neither defendant filed a motion for new trial within three days thereafter, as required by statute. July 27, 1933, each defendant tendered a conventional motion for a new trial without any reference to newly discovered evidence, and also filed a motion for an order permitting such defendant to file the motion for new trial *nunc pro tunc* as of June 24, 1933. On July 27, 1933, the district court overruled the motion to permit the motion for new trial to be filed out of time. No abuse of discretion appears. The filing of a motion for new trial is provided for in section 20-1143, Comp. St. 1929. It is mandatory, for a review of errors occurring at the trial, that the motion be filed within three days after the decision is rendered, except for the cause of newly discovered evidence. *Nebraska Nat. Bank v. Pennock*, 59 Neb. 61; *Carmack v. Erdenberger*, 77 Neb. 592; *Havens-White Coal Co. v. Bank of Rulo*, 98 Neb. 632; *Young v. Estate of Young*, 103 Neb. 418. No motion for a new trial having been filed, we cannot review the errors alleged to have been committed by the trial court.

We make no survey of the merits beyond that involved in the motion to dismiss and express no opinion upon the validity of the city ordinance. For the reasons stated, the

motion of the city of Lincoln to dismiss the petitions in error is sustained.

DISMISSED.

LAURA ELEANOR HAYNES, ADMINISTRATRIX, APPELLANT, V. NORFOLK BRIDGE & CONSTRUCTION COMPANY ET AL., APPELLEES.

FILED MARCH 2, 1934. No. 28776.

1. **Automobiles: HIGHWAYS: CONSTRUCTION: ACCEPTANCE OF WORK.** The acceptance that is required by the proprietor of the work of a contractor, in order to relieve the contractor of liability for injuries to third persons after the acceptance, is a practical acceptance after the completion of the work, a formal acceptance not being required.
2. **Trial: DIRECTION OF VERDICT.** The trial court should direct verdict for defendant, where evidence is insufficient to sustain a verdict against him.

APPEAL from the district court for Madison county: DE WITT C. CHASE, JUDGE. *Affirmed.*

George I. Craven and *Williams & Williams,* for appellant.

Deutsch & Stevens, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

GOOD, J.

Laura Eleanor Haynes, as administratrix of the estate of her deceased husband, Thomas Haynes, brought this action on behalf of herself and minor children, to recover damages because of the death of her husband, which she alleges was caused by the wrongful and negligent acts of the Norfolk Bridge & Construction Company. At the conclusion of all the evidence, the trial court, on motion of defendant, directed a verdict in its favor. Plaintiff has appealed.

We are required to determine from the record whether there was sufficient evidence to require submission of the cause to the jury.

In November, 1929, the Norfolk Bridge & Construction Company (hereinafter referred to as the Norfolk Company) entered into a contract with the state of Nebraska, whereby it was to construct and install all culverts required on a highway extending from the city of Albion eight miles south. The project was designated and known as 619-A. The Norfolk Company began constructing the culverts at the south end of project 619-A and worked north. The last work being done was the laying or installing of twin concrete culverts a short distance south of the city of Albion. These twin culverts were each 36 inches in diameter, and the roadway was excavated to the depth of about 1½ feet. The concrete culverts were 36 feet and 40 feet long, respectively, and were laid parallel to each other. The Norfolk Company, after the excavation and placing of these culverts in position, threw the dirt that had been excavated so as to make an approach to and cover the center part of the culverts. The evidence shows that the last work done upon this project 619-A by the Norfolk Company was on the 18th day of July, 1930; that at that time the state's project engineer and the foreman of the Norfolk Company together estimated and agreed upon the yardage, and the engineer entered in his book, kept for the purpose, that the work was finished or completed. A day or two thereafter the Norfolk Company removed all of its equipment and entered upon the work of construction on project 620-A, several miles distant from the scene of the twin culverts, and upon an entirely different contract. The record discloses that there was also a second contract between the state and another contractor, the latter to do the work of grading and surfacing on project 619-A after the culverts were installed. The record shows that this contractor entered upon its work of grading and surfacing the road on the 15th day of July, 1930.

About midnight of July 29, 1930, Thomas Haynes and a companion were driving north over this road, and, in attempting to pass another car in front, ran into the west end of the twin culverts which was not yet covered with dirt. Haynes' car was overturned, and he sustained injuries from which he died on the 10th of August, 1930.

It is plaintiff's contention that the work done by the Norfolk Company had not been accepted by the state; that it was yet in control of that part of the road where the twin culverts had been installed, and that the Norfolk Company had failed to erect barriers or put up warnings or danger signals to advise plaintiff's husband and others traveling upon the highway that it was under construction and dangerous for travel.

The record shows that the project, or resident, engineer, in the course of his work, makes his reports to the district engineer, who, in turn, makes his reports to the department of public works at the state capitol, and that the district engineer did not send any recommendation of formal acceptance of the work on project 619-A to the department of public works until the 6th day of August, 1930. Plaintiff insists that until this acceptance was made the contractor was in charge of the highway and under duty of maintaining barricades, warning signs, and red lights, as provided by the contract between the state and the Norfolk Company.

During the trial plaintiff introduced in evidence a part of a single sentence from the 15th paragraph of defendant's answer, and contends that this amounts to an admission that the work of defendant on the twin culverts had not been accepted by the state until August 6, 1930, or nine days after the accident. Standing alone, the sentence may lend color to the plaintiff's contention, but, if taken in connection with the other allegations of the paragraph, it fails, in our opinion, to have the probative force asserted by plaintiff.

The following is the portion of the paragraph that is material to this consideration, the italicized words being

the part introduced in evidence by plaintiff: "On the 18th day of July, 1930, this answering defendant completed the construction of such work on such section and the engineer in charge thereupon inspected the same and calculated the excavation and yardage in company with the superintendent of this answering defendant and each agreed upon the completion of the construction of such culverts according to the specifications and contract and further agreed upon the yardage reflected in the excavation necessary for the installation and construction of such culverts, and the said engineer in charge then noted the said work in writing in the presence of the said superintendent as completed and finished and then expressly informed the said superintendent to not move any additional dirt thereon and advised and informed him that arrangements had been made with a county commissioner of Boone county to move dirt at any culvert or bridge construction upon said project because of the high contract price for grading provided in the contract with this answering defendant, and then tentatively accepted such construction in writing, and accepted the maintenance thereof on behalf of the state, and authorized this answering defendant to remove from said project to the said project 620-A and that subsequently, *on the 6th day of August, 1930, the said engineer and his superiors made their final estimates and recommendation for final acceptance to the office of the said department of public works at Lincoln, Nebraska, and the said construction upon said project 619-A and especially the said twin culvert construction was formally and finally accepted by the said department of public works in the course of the routine thereof* and that this answering defendant, subsequent to the 18th day of July, 1930, was not prosecuting any construction upon said project 619-A but had fully and completely performed its contract aforesaid and was not in possession or upon any of said project 619-A but had completed the same according to specification and delivered the same to the said state of Nebraska and the said

state of Nebraska was in possession thereof as proprietor at the time of the accident aforesaid."

Taking the paragraph as a whole, it seems clear that there is nothing that amounts to an admission that the work had not been completed and accepted by the state, unless it is contended that, by acceptance, is meant formal acceptance. However, plaintiff admits in her brief and on oral argument that formal acceptance is not essential.

The contract between the state and the Norfolk Company makes provision for tentative acceptance and relieving the contractor of liability for accidents occurring upon the highway. Section 7.13 provides:

"Opening of Section of Highway to Traffic.

"At the option of the engineer certain sections of the work may be opened to traffic. In such case the section will be inspected, completed work tentatively accepted in writing at the discretion of the engineer, and the same turned over to the state for maintenance. Such action shall not in any way be construed as a final acceptance of the road.

"Upon written authorization by the engineer the contractor may cease to maintain barriers and red lights; the road may be opened to traffic; the contractor is relieved from further maintenance of barriers and lights on that portion of the road; and the contractor is relieved from further public liability on that portion of the road.

"The contractor will not be held responsible for damages to portions of the road which have been approved by the engineer and opened to traffic prior to final approval and acceptance of the road, provided such damages are due to actions of the elements or to the ordinary action of traffic. The contractor is responsible for any damages which may have been occasioned by defective work or because of noncompliance with the plans, specifications and contract."

There is no evidence in the record that there were any defects in the work performed by the Norfolk Company,

or that it failed in any respect to comply with the plans and specifications of the contract.

It is a general rule that the acceptance that is required by the proprietor of the work of a contractor, in order to relieve the contractor of liability for injuries to third persons after the acceptance, is a practical acceptance after the completion of the work, a formal acceptance not being required. This rule is supported in *McCrorey v. Thomas,* 109 Va. 373; *Rengstorf v. Winston Bros. Co.,* 167 Minn. 290; *First Presbyterian Congregation v. Smith,* 163 Pa. St. 561; *Memphis Asphalt & Paving Co. v. Fleming,* 96 Ark. 442; *Read v. East Providence Fire District,* 20 R. I. 574; *Armstrong v. City of Tulsa,* 102 Okla. 49; and numerous other cases. The rule is also substantially stated in 45 C. J. 884, and in 20 R. C. L. 53, sec. 49. In the *Rengstorf* case the facts were very similar to those involved in the instant case. The contract was quite similar to the one involved in this action. The injury occurred after completion of the work and before final formal acceptance. It was there held that the contractor was not liable. In many of the cases the acceptance that will relieve the contractor is designated as actual, factual, practical, or tentative, as distinguished from final and formal acceptance.

In the instant case it appears beyond dispute that defendant had completed its work and did no work on the culverts after the 18th day of July; that there was no other work for the contractor to do after that date; that on that day the contractor removed its equipment to another locality under the direction of the state's engineer. It is undisputed that the work was inspected by the state's engineer in company with the defendant's superintendent; that the engineer designated the work of the culverts as 100 per cent. complete and entered on his book a record that defendant's work was finished. We think, beyond question, this amounted to a tentative and actual acceptance and relieved the contractor from any further duty to maintain lights, guards or other warning

signals after that date. The burden was upon the plaintiff to establish that the contractor was yet in charge and control of the work at the time of the accident. In this she has utterly failed. There is no evidence that would warrant submitting this question to the jury. Trial court should direct verdict for defendant where evidence is insufficient to sustain a verdict against him.

There are other assignments of error and a cross-appeal by defendant, but the conclusion reached renders it unnecessary to consider either the cross-appeal or the other assignments of error.

The judgment is right and is

AFFIRMED.

EARL A. TEMPLE, APPELLANT, V. COTTON TRANSFER COMPANY ET AL., APPELLEES.

FILED MARCH 2, 1934. No. 28801.

1. Action. Where the transactions involved are neither *contra bonos mores* nor obnoxious to public policy, the procedure in civil jury trials in the district court is regulated and controlled by our Civil Code.
2. Trial. The requirements of section 20-1107, Comp. St. 1929, that, after a jury is impaneled and sworn, "the plaintiff must briefly state his claim, and may briefly state the evidence by which he expects to sustain it," neither necessitate the statement by his counsel of a "cause of action," nor require the recital of all evidence relied upon to establish the same.
3. ———. Such opening statement of plaintiff's attorney, thus required to be made, must be viewed in the light of the limited purpose it is intended to serve, and will not ordinarily be regarded as a distinct and formal admission made for the express purpose of dispensing with formal proof of a fact at the trial, and thus binding as such upon the plaintiff.
4. ———. In civil actions, where the pleadings disclose a proper, justiciable controversy, the practice of trial courts, at the close of opening statements to the jury, in directing the entry of a nonsuit, the dismissal of the action, or the return of a verdict based upon such statements is disapproved.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Reversed.*

Harry R. Ankeny, for appellant.

Reed, Ramacciotti & Robinson, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

EBERLY, J.

This is an action at law for damages alleged to have resulted to plaintiff by reason of personal injuries received while "lawfully riding as a passenger and guest in an automobile, the property of one E. Byron Hirst," which was by Hirst operated and driven at the time of the accident. Plaintiff alleged that the accident from which his injuries resulted was due wholly to the unlawful and negligent parking by the defendant Cotton Transfer Company and its drivers of two trucks upon the traveled portion of the highway; that due to the situation of the trucks a collision followed in which plaintiff sustained the injuries for which this suit was brought. The allegations of plaintiff's petition were denied by defendants, and contributory negligence was pleaded. Issues were made up by plaintiff's reply which was a general denial of the allegations of the answer.

The transcript of the record in the district court discloses that, after the impaneling of the jury, the following proceedings were had: "The said jury having heard the opening statements made by plaintiff's counsel on behalf of said plaintiff, thereupon the defendants move the court to discharge the jury and dismiss this cause, upon consideration whereof, the court, being fully advised in the premises, sustains said motion." Thereupon the court ordered the action dismissed.

The bill of exceptions discloses that the order of dismissal was entered on motion of the defendants, orally made, after the opening statements of plaintiff's counsel following the impaneling of the trial jury, and was in the

following terms: "At this time the defendants, and each of them, individually move the court to withdraw this case from the jury and enter judgment in favor of the defendants on the petition of plaintiff and the opening statement of counsel for the plaintiff, or in the alternative, to instruct the jury to return a verdict for defendants on said petition and opening statement."

The lawfulness and regularity of this direction of the trial court is presented here by this appeal.

Appellees seek to sustain the action taken by the contention in their brief that, "Where counsel in his opening statement to the jury fails to state a cause of action, it is within the power of the trial court to render judgment on such statement for the defendant." Further, that there was such failure in the instant case, and the judgment entered was proper.

The action of the trial court in the present case exemplifies a development in legal proceedings peculiar to American jurisprudence. The principle of procedure here involved is to be distinguished from cases involving the exercise of the inherent power of courts when their jurisdiction is invoked in transactions which may clearly be deemed *contra bonos mores* or obnoxious to public policy, such as an attempt by judicial procedure to obtain compensation for acts which the law denounces as corrupt and immoral, or declares to be criminal, such as attempts to bribe a public officer, or to evade the revenue laws, embezzle public funds, or clear, intentional, manifest, and continued abuse of judicial functions or process. In such a case it is the manifest duty of any court to take advantage of any source of information available and, on its own motion, exercise the full measure of its powers of investigation, and if it should clearly appear that for any reason suggested there could be no recovery, such court should not hesitate to so declare, and give such direction at the earliest possible moment as will dispose of the action. *Oscanyan v. Arms Co.*, 103 U. S. 261; *Ferson v. Armour & Co.*, 109 Neb. 648.

But matters of this class are not involved in the present investigation. Here we have a justiciable controversy for personal injuries sustained, wherein the plaintiff is constitutionally guaranteed an open court for any injury done him or his person, and a remedy by due course of law (Const. art. I, sec. 13) in which the right of trial by jury is inviolate (Const. art. I, sec. 6). The trial judge interposed at the conclusion of the opening statement of plaintiff's counsel to the jurors, discharged the jury, and dismissed the action. The legal sufficiency of the evidence to go to the jury, as narrated by the counsel in his opening statements, was the sole matter considered by the trial judge, and the one on which his action was based. The relief administered by him was not a direction to the jury to return a verdict, treating the opening statement as an admission of fact, but the sole order of the court in the instant case was that the action "be dismissed," plaintiff excepting.

"A dismissal in effect is equivalent of a nonsuit, and, in practice, also imports the same thing as a discontinuance, namely, that the cause is sent out of court." 18 C. J. 1145.

In justice to the action of the trial court, it may be said to be supported by ample authority evidenced by precedents in jurisdictions other than our own; though even where prevailing the practice is admittedly one that involves dangers and must be followed with extreme caution. This court, as yet, has never approved it. It is not universally recognized even in the American jurisdictions. Thus, the practice of granting a nonsuit on the opening statement by counsel for plaintiff does not prevail, and never has prevailed, in the Code state of Wisconsin. *Haley v. Western Transit Co.*, 76 Wis. 344; *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322; *Fisher v. Fisher*, 5 Wis. 472.

Notwithstanding the liberality of the practice which obtains in the courts of England since the adoption of their reformed procedure, the practice here under con-

sideration is there precluded. Thus, in *Fletcher v. London & N. W. R. Co.*, 65 Law Times n. s. 605, 1 Q. B. 122, the plaintiff sued to recover damages for personal injuries sustained by him. At the trial, after plaintiff's counsel had opened the case to the jury, the presiding judge nonsuited him. On review it was held, all judges concurring: "A judge, at the trial of an action, has no power to nonsuit the plaintiff upon the opening statements of his counsel, unless his counsel consents to that course being taken." Among the reasons advanced in support of this determination were the following: "It is almost unnecessary to point out how dangerous such a course may be. Briefs of counsel do not always give all the facts of a case; sometimes there are other material facts which are not stated in the brief; sometimes the witnesses give evidence which differs from that which appears in the brief and alters the aspect of the case; sometimes upon the cross-examination of the plaintiff himself evidence is elicited which is favorable to his case. For those reasons it is very undesirable that a judge should have power to nonsuit a plaintiff upon the opening of his case." Further, "That would be a startling result in an English court of justice."

In this state the practice of the district court is governed by the provisions of our Civil Code, so far as applicable.

In the instant case the transcript discloses that an issue of fact arising in an action for the recovery of money only had been duly formed by the pleadings of the parties, and as there was no waiver by such parties shown, it was for trial by a constitutional jury. Comp. St. 1929, secs. 20-1101 to 20-1112. The course of a jury trial in the district court, after a jury has been impaneled, is prescribed by section 20-1107, Comp. St. 1929. In the present case, there being "no contrary directions" by the trial court, plaintiff's counsel, after the impaneling of the jury, exercised the rights secured to his client by the first subdivision of the Code section last referred to, viz.: "First.

The plaintiff must briefly state his claim, and may briefly state the evidence by which he expects to sustain it." It will be noted that the word "claim," as employed in the statutory provision last quoted, embraces no more than is involved in the definition of this term by Webster's New International Dictionary, viz.: "A demand of a right or supposed right; a calling on another for something due or supposed to be due; an assertion of a right or fact." It is quite different, considered both as to definition and as to context, from the term "petition," as used in our Civil Code. As to the latter the Code requirements are that a "petition" must contain: "Second. A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition." Comp. St. 1929, sec. 20-804. It is quite plain that the statutory language employed does not import into the term "claim" the statutory requirement for a good petition. And it must follow that the statutory direction to "briefly state his claim" is not to be deemed a requirement to "state a cause of action" in the technical sense of those words. And, again, permission to plaintiff's counsel to "briefly state the evidence by which he expects to sustain it (the claim)" is wholly incompatible with the thought that the entire evidence on the subject involved must be detailed to the jury at this time, and that failure so to do will furnish the basis of a denial of plaintiff's cause of action.

On the contrary, the statutory purpose indicated by the general language under consideration, it seems, requires no more, in view of the object to be attained thereby, than that counsel present to the jury the nature of the questions involved which the evidence later to be presented for their consideration will tend to establish, and advise the jurors of the issues to be determined so as to enable them to understand the case to be tried as it will be presented by the proof.

Moreover, this court is committed to the view that the power of counsel to bind his client by admissions made is

not involved at this stage of a lawsuit. "Considerable latitude must be allowed counsel at the commencement of a trial in making the opening statement in which he states the evidence by which he expects to sustain his cause of action or defense." *Yechout v. Tesnohlidek*, 97 Neb. 387. And we have expressly refused to penalize a client because the proof subsequently offered may involve a failure to sustain the "opening statement" made. *Yechout v. Tesnohlidek, supra.*

Then, too, by the terms of our Civil Code the issues to be tried in a lawsuit in the district court are ordinarily determined by the written pleadings of the parties. The making of the "opening statements," as prescribed by the Code, evinces no intention on the part of the authors of our Code that the written pleadings of the parties shall be altered or varied thereby. This conclusion as to pleadings finds ample support in the following precedents: *Lane v. Portland R., L. & P. Co.*, 58 Or. 364; *Hunter Milling Co. v. Allen*, 65 Kan. 158; *Moore v. Dawson*, 220 Mo. App. 791.

And, again, we find that our Civil Code (Comp. St. 1929, sec. 20-601) also expressly regulates the common-law powers of a court to enter a "nonsuit" at least in cases of the class now under consideration. The present controversy under the Code section last referred to is not one in which a "nonsuit" is authorized. Indeed, the closing words of this provision are, "In all other cases on the trial of the action the decision must be upon the merits," and must be deemed applicable and controlling in the instant case.

The concluding words quoted from the section just referred to obviously preclude the adoption by our court of a rule, either through judicial decision or by the exercise of its constitutional powers to promulgate rules of practice and procedure, empowering and authorizing trial courts to enter a "nonsuit" upon the conclusion of the opening statement of counsel to the jury made as provided by section 20-1107, Comp. St. 1929. This for the

reason already stated, because such rule, if adopted, would necessarily be "in conflict with laws governing such matters." Const. art. V, sec. 25. Indeed, this court has already announced the doctrine that a dismissal by a court, or entry by it of an order of nonsuit, under the circumstances of this case, is contrary to the provisions of the statute just quoted, wholly unauthorized, and erroneous. *Zittle v. Schlesinger*, 46 Neb. 844; *Thompson v. Missouri P. R. Co.*, 51 Neb. 527. Yet the practice of the entry of a nonsuit thus condemned is the practice generally followed in the disposition of questions similar to the present one in the jurisdictions from which the appellees' sustaining precedents are drawn. True, in *Zittle v. Schlesinger, supra,* the evidence of plaintiff in the district court had been regularly received, and was before this court as contained in the bill of exceptions. This court after determining that "Under our Code a trial court has no authority to enter an involuntary nonsuit and judgment of dismissal, because the plaintiff fails by his evidence to establish his cause of action," also determined that "A judgment so entered will not be reversed by this court where, on the evidence, the defendant was entitled to have a verdict directed. In that case the error is without prejudice." In *Thompson v. Missouri P. R. Co., supra,* the rule announced in the *Zittle* case was followed, but the cause was reversed for the reason that the facts were such that the defendant was not entitled to an instructed verdict, and therefore the original error committed by the trial court in the entry of the nonsuit was thereby not cured.

But these cases in no manner sustain appellees' contention. Even the cases on which they rely, which are from jurisdictions other than our own, recognize a distinction between the act of a court directing a dismissal at the close of the opening statement and the action of a court directing a verdict at the close of a party's evidence. As to the former situation, the weight of appellees' authorities (in entire absence of statute) sustain the prop-

osition, viz.: "The failure of counsel in his opening statement to recite all the material facts necessary to a recovery will not warrant the court in taking the case from the jury, and the neglect of defendant to refer to a certain defense in his opening statement will not bar the establishment of such defense on trial." 64 C. J. 239. See, also, *Jones v. Railroad Co.*, 5 Mackey (D. C.) 8; *Wheeler v. Oregon R. & N. Co.*, 16 Idaho, 375; *Berggren v. Johnson*, 105 Kan. 501; *Brashear v. Rabenstein*, 71 Kan. 455; *Goodman v. Brooklyn Hebrew Orphan Asylum*, 165 N. Y. Supp. 949; *Darton v. Interborough Rapid Transit Co.*, 110 N. Y. Supp. 171; *Stewart v. Hamilton*, 26 N. Y. Super. Ct. 672; *Portugal v. Ottens*, 147 N. Y. Supp. 933; *Fini v. Perry*, 119 Ohio St. 367; *Fiegel v. First Nat. Bank*, 90 Okla. 26; *Sullivan v. Williamson*, 21 Okla. 844; *Redding v. Puget Sound Iron & Steel Works*, 36 Wash. 642; *Martin Emerich Outfitting Co. v. Siegel, Cooper & Co.*, 108 Ill. App. 364; *Petherick v. Order of the Amaranth*, 114 Mich. 420; *Meeks v. Meeks*, 106 N. Y. Supp. 907.

In the last analysis the controlling element in the decision of the question here presented is the policy evidenced by the provisions of our Civil Code already referred to. The purpose of the opening statements of counsel is in aid of the jury. The trial judge has access to, and finds the exact issues to be tried in, the written pleadings. "Issues" are stated to the jury by counsel in opening his case only to the extent that a knowledge thereof may be deemed helpful in the consideration of the evidence subsequently to be introduced. Evidence expected to be produced is narrated only to a similar extent and for the same reason. The very form and purpose of the Code provision precludes the conclusion that completeness or technical exactness is a requirement as to performance of either duty involved or permitted in the opening statement. Remarks of counsel made in the performance of this duty may be viewed in the light of the limited purpose which calls them forth. Clients may not be penalized for failure of attorneys to conform to

requirements which the terms of the statute do not exact. It also clearly appears that these statements may not, because of the limited purpose which called them forth, be deemed "admissions" in the technical sense of that term. "Admissions by counsel, made in good faith at the trial of an action in open court for the purpose of dispensing with testimony, bind their clients. * * * But such admissions, in order to bind a client, must be distinct and formal, and made for the express purpose of dispensing with formal proof of a fact at the trial." 6 C. J. 649. See, also, *Godwin v. State,* 1 Boyce (Del.) 173; *Cable Co. v. Parantha,* 118 Ga. 913; *Preston v. Davis,* 112 Ill. App. 636; *Chown v. Lennox Furnace Co.,* 166 Ia. 1; *Treadway v. Sioux City & St. P. R. Co.,* 40 Ia. 526; *Scott v. Chambers,* 62 Mich. 532; *Sullivan v. Dunham,* 54 N. Y. Supp. 962; *Hicks v. Manufacturing Co.,* 138 N. Car. 319; *Virginia-Carolina Chemical Co. v. Knight,* 106 Va. 674.

In *Davidson v. Gifford,* 100 N. Car. 18, 23, it was held: "Merely casual, hasty, inconsiderate admissions of counsel in the course of a trial, do not bind the client; they are not intended to have such effect, nor does the nature of the relation of attorney and client produce such result. And this is so, although the client be present when such inconsiderate admissions are made. It would be rude, indecorous, disorderly and confusing, if the client should interpose to correct his counsel and disclaim his authority to make such admissions. Neither the court, counsel, nor any intelligent person expects him to do so. And for the like reason, the client, if examined as a witness, is not required to disclaim such admissions of his attorney, unless he shall be examined by the opposing party for that purpose."

The obvious conclusion of the preceding discussion, including precedents cited and considered, is that the remarks of counsel for appellant embraced in his opening statements to the trial jury in the instant case, and contained in the bill of exceptions, in view of the limited purpose for which they were required to be made, may

not be regarded as "distinct and formal, and made for the express purpose of dispensing with formal proof of a fact (or facts) at the trial," so as to constitute them "admissions" in the technical sense of that term and binding upon appellant herein.

It also follows that the action of the trial court, based upon such statements so made, whereby it entered a judgment of nonsuit and dismissed this action, was not contemplated by the terms of the statute, and was wholly unjustified by the recitals contained in the bill of exceptions filed herein; and that error was committed in the rendition of the same.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

ROSA JOHNS WHEELER, APPELLANT, V. FRANK J. BRADY, ADMINISTRATOR OF THE ESTATE OF WILLARD A. WHEELER, ET AL., APPELLEES.

FILED MARCH 2, 1934. No. 28827.

1. Judgment: RES JUDICATA. "Any right, fact or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not." 34 C. J. 743.
2. ———: ———. An adjudication in an action to quiet title against a purported deed, testamentary in character, is not *res judicata* to a suit to reform the instrument.
3. Contracts: REFORMATION. "To warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing and satisfactory, and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties." *Sutherland State Bank v. Dial*, 103 Neb. 136.

4. **Deeds: REFORMATION.** In suit to reform deed of deceased grantor, evidence of casual statement to witnesses that he had deeded his property to wife and that he had nothing for some other heirs is not such clear, convincing and satisfactory evidence as necessary to overcome the terms which provide that it was not to be in force while grantor lived; that it was to be in force after his death; and that it might be filed after his death if he still owned the property, and to justify reformation so that deed would be an absolute conveyance with reservation of life estate in grantor.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Hotz & Hotz, for appellant.

J. J. Harrington and *D. R. Mounts, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and MEYER, District Judge.

DAY, J.

This is a suit to reform a purported deed and to quiet title to real estate. The deed is the ordinary quitclaim deed except for a provision which caused this controversy. It was given to Mrs. Wheeler by her husband about six months before his death, after which she caused it to be recorded. The other heirs of Mr. Wheeler brought a suit to set aside the deed and quiet title in themselves to an undivided one-half interest in the real estate. The trial court decreed that the purported deed was in fact testamentary in character but that it was not executed in accordance with the laws pertaining to the execution of wills and quieted title in the plaintiffs. Mrs. Wheeler appealed from this judgment, which was affirmed by this court, *Miller v. Wheeler*, 120 Neb. 874, on the authority of *Pinkham v. Pinkham*, 55 Neb. 729. Subsequently, this suit was commenced in the district court and upon trial a decree was entered against the plaintiff. In the decree, the court found generally in favor of defendants. The assignments of error present two questions: (1) Application of the doctrine of *res judicata* and (2) considera-

tion of the evidence to determine if it requires a reformation of the deed. The present suit was commenced by filing a petition in the same case, and the theory of the plaintiff, who was formerly the defendant, is that, after the case was affirmed, she was entitled to file a petition asking reformation, since the adjudication by the court that a deed is testamentary in character is not *res judicata* nor a bar to an action to reform the instrument. She relies upon the case of *Pinkham v. Pinkham*, 60 Neb. 600. In that case, the trial court had decreed that a deed was a conveyance of the present title. This court held upon appeal that the deed was not a conveyance but was testamentary in character, reversed the judgment of the trial court and remanded the case for further proceedings. Whereupon the defendant filed an amended answer pleading mistake and error in the drawing of the deed and asking for a reformation. In that case it was held that where a case was remanded generally, and not for a particular purpose, the trial court, in the exercise of a sound discretion, may permit amendments of the pleadings. This is not the situation here and the rule is not applicable.

A suit was brought against plaintiff, the wife of deceased, by other heirs to quiet title to real estate which was clouded by this purported deed. A decree was entered that the purported deed was testamentary in character but not executed in accordance with the law of wills and quieted title in the heirs. Whereupon plaintiff brought this suit to reform the purported deed and quiet title in her against the same heirs. Does the judgment in the first suit constitute a bar to the second suit?

The former decision is not of course an adjudication that the contract cannot be reformed. That question was not presented nor considered at that time. That suit only decided that the purported deed as it stood did not convey title to the real estate in question, because it was testamentary in character, but since it was not executed according to the law relating to wills, title to a portion

of the property was quieted in the other heirs at law. The cases in which the fundamental principles of *res judicata* are discussed are legion. All we need as a test here is the general rule, which is well stated as follows: "Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not." 34 C. J. 743. The right of reformation was not a right, fact, or matter litigated in the first suit and the judgment therein was not a bar to this suit.

In *Grand View Bldg. Ass'n v. Northern Assurance Co.*, 73 Neb. 149, a suit which was brought to reform a policy of fire insurance after an action at law had previously been brought upon the policy in the federal court and a verdict obtained, an appeal was taken to the circuit court of appeals, where the judgment was affirmed, and the case removed thence by certiorari to the supreme court of the United States, which latter court reversed the judgment of the lower courts and, in obedience to a mandate from the supreme court, the circuit court rendered a judgment for the defendant company upon the merits. *Northern Assurance Co. v. Grand View Bldg. Ass'n,* 183 U. S. 308. In this court, that case held: "A suit in equity to reform a policy of fire insurance so that it will express consent to concurrent insurance, and to recover on the instrument as so reformed, may be maintained after the termination of an unsuccessful action at law to recover on the unreformed contract." *Grand View Bldg. Ass'n v. Northern Assurance Co.*, 73 Neb. 149. Since this court affirmed a judgment in that case on the policy, the case was removed to the supreme court of the United States, and that court held: "An adjudication in an action at law on a policy of insurance that the insured cannot re-

cover on the policy as it then stood is not an adjudication that the contract cannot be reformed." *Northern Assurance Co. v. Grand View Bldg. Ass'n,* 203 U. S. 106. See, also, *City of Omaha v. Redick,* 61 Neb. 163; *Reams v. Sinclair,* 97 Neb. 542; *Simons v. Fagan,* 62 Neb. 287; *Uppfalt v. Woermann,* 30 Neb. 189. We are constrained to hold that the correct rule is that an adjudication in an action to quiet title against a purported deed, testamentary in character, is not *res judicata* to a suit to reform the instrument. This conclusion is reached without reference to election of remedies, which could not be pertinent here, if ever, for that plaintiff was defendant before and did not make an election.

It therefore becomes the duty of this court to consider the evidence to determine if the plaintiff in this suit is entitled to a reformation of the deed as requested. The plaintiff prays that the deed be reformed according to the intentions of herself and husband at the time it was executed so that it will vest the title in her with a life estate in her husband. Such relief was granted in a somewhat similar case, *Pinkham v. Pinkham,* 60 Neb. 600. It was held in that case that a deed of conveyance founded upon consideration should be reformed to accomplish a result which the plaintiff prays for in this case. But there is a distinction in this case from that of the *Pinkham* case in that the mistake in that case was one of the conveyancer. The evidence established that the grantor relied upon the conveyancer to express in the deed his reservation of a life estate in the property conveyed. All of the evidence supported the allegation that it was the unequivocal intention of the grantor in that case to execute such a deed. The language reformed in the *Pinkham* case is: "This deed is to take effect and be in full force from and after my death." As was stated in that case, the mistake was not a glaring one and the conveyancer might easily have misunderstood the purport and legal effect as well as the intention of the grantor. What is the evidence in this case? The provision which it is

sought to reform was written in a printed form quitclaim deed by the grantor himself. It is: "This deed on the above described property is not to be in force and effect as long as I am here on earth alive, but, after my natural death, this deed may be filed and become in full force and effect as if done before in the usual way, providing said property belongs to me at the time stated." This was a studied and labored effort, not to do what the plaintiff asks us to do here. He retained the title, because the deed was not to be filed and he reserved the right in himself to dispose of the property up until the time of his death. This was not accomplished by the use of technical language which deceased did not understand. It is ordinary, simple language, clear and unambiguous, which any one could understand. To reform this provision of the deed or to eliminate it would be to rewrite grantor's deed. There was no mistake of fact as to the provision of the deed. The only mistake, if any, was the legal effect after his death.

There is evidence that the grantor did not want his property to go to some of the defendants in this case, and there is evidence that he told witnesses that he had deeded the property to his wife, but, at about the same time, he placed with his own hand a provision in the purported deed which gave it a testamentary character instead of a present conveyance of the title to the real estate. The provision he inserted with his own hand speaks more persuasively than any evidence of a casual statement. The grantor neither desired nor intended to convey the property to his wife when he executed the purported deed. The language negatives such an intention. It was not to be in force while he was alive; it was not to be filed until his death, and it was not to be effective then, if he had disposed of the real estate previously. "To warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing and satisfactory, and until overcome by such proof, the terms of the instrument must stand as evidenc-

ing the intention of the parties." *Sutherland State Bank v. Dial*, 103 Neb. 136. See *Paine-Fishburn Granite Co. v. Reynoldson*, 115 Neb. 520.

Upon a trial *de novo*, it is found that plaintiff is not entitled to a reformation of the instrument. The judgment of the trial court will not be disturbed.

AFFIRMED.

C. F. CONNOLLY, TRUSTEE, APPELLEE, V. PROVIDENCE WASHINGTON INSURANCE COMPANY, APPELLANT: OMAHA LOAN & BUILDING ASSOCIATION, APPELLEE.

FILED MARCH 2, 1934. No. 28765.

1. **Trial**: INSTRUCTIONS. "Generally, it is error for the trial court, by its instructions, to submit to the jury an issue not raised by the pleadings, if the submission of such issue is likely to prejudice the rights of one of the litigants." *Citizens Nat. Bank v. Sporn*, 115 Neb. 875.
2. **Insurance**: POLICY: ASSIGNMENT. Where a policy of fire insurance by its terms provides that the policy shall be void if the policy is assigned before loss, unless the assent of the company is indorsed thereon or added thereto, an assignment of the policy without such consent of the insurance company is invalid and inoperative.
3. ———: ———: ———: VALIDITY. In such case, where the indorsement of the consent of the company to the assignment of an insurance policy is made after a fire has destroyed the insured property and without notice of such fire to the agent making such indorsement on the policy, the consent to such assignment is void.
4. **Evidence** examined, and *held* insufficient to support the verdict of the jury and the judgment of the trial court.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed.*

William C. Ramsey and *Sherman S. Welpton, Jr.*, for appellant.

Sidney W. Smith and *Crofoot, Fraser, Connolly & Stryker, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

ELDRED, District Judge.

This is an action on a fire insurance policy. From a verdict and judgment for plaintiff, defendant insurance company has appealed. Plaintiff filed a cross-appeal contending that the recovery is insufficient in amount.

On the 20th day of September, 1928, the defendant insurance company issued to one John D. Suchart the fire insurance policy involved in this action, insuring a residence property for the sum of $6,000, garage for $1,500, and a chicken house for $150, from said date to September 20, 1931; all of said buildings being upon real estate in Douglas county, the title of which was vested in one John D. Suchart. Mortgage clauses were attached to the policy in favor of the defendant Omaha Loan & Building Association.

On November 10, 1930, Suchart and wife conveyed the property to the plaintiff, C. F. Connolly, trustee.

On December 5, 1930, the insurance policy in question was assigned by John D. Suchart to the plaintiff, C. F. Connolly, trustee, and plaintiff alleges that the insurance company consented to the assignment. The defendant, by its answer, put in issue the question of consent to the assignment.

By the "proof of loss" made by the plaintiff it appears that on the 13th day of January, 1931, at about the hour of 1:23 a. m., a fire occurred which completely destroyed the insured dwelling-house and damaged the garage.

The defendant insurance company, in its answer, admits the fire occurred at the time above stated, and that the dwelling-house was destroyed and the garage damaged thereby; admits the conveyance of the property by Suchart to plaintiff, but alleges that said conveyance was made without the knowledge or consent of the insurance company, and in violation of the terms of the policy, which provided:

"This entire policy, unless otherwise provided by agree-

ment indorsed hereon or added hereto, shall be void * * * if any change, other than by death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process, or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before loss."

Further answering, the defendant alleges that on the afternoon of January 13, 1931, and after the fire which occurred in the morning of said date, the defendant, through its agents, Reynolds Brothers, of Fremont, Nebraska, without any knowledge or notice of said fire, was induced by plaintiff to sign a consent to an assignment of said policy from said John D. Suchart to plaintiff; that such consent to said assignment was procured by the fraud or concealment of the plaintiff in failing to disclose to the general agents of this defendant the fact or knowledge of said fire.

The plaintiff, by way of reply, pleads that the defendant insurance company has waived any defense it might have had based upon the time of indorsement of its consent to the assignment of the policy of insurance, because the policy itself with the assignment of the same had been in the hands of the defendant insurance company's agent for several days prior to the fire loss; and further alleges that at no time since said date has the defendant insurance company repudiated its consent to the assignment of the policy, or tendered back, either to John D. Suchart or to the plaintiff herein, any part of the insurance premium; and the plaintiff alleges that the defendant insurance company accepted and retained, and still retains, the full premium upon said insurance policy, and is estopped from asserting any defense based upon the delay in completing the transfer of the insurance policy from John D. Suchart to the plaintiff.

The mortgage clause attached to the policy provided that the insurance, as to the interests of the mortgagee, shall not be invalidated by any acts or neglect of the

mortgagor or owner of the property insured, nor any change in the title of the property, whether by legal process or otherwise; also, that whenever the company shall pay the mortgagee any sum for loss under the policy, and shall claim that as to the mortgagor or owner no liability therefor existed, it shall at once, and to the extent of such payment, be legally subrogated to the rights of the mortgagee to whom such payments shall be made under any and all securities held by the mortgagee for the payment of said debt; or, such company may, at its option, pay to said mortgagee the whole debt secured, with all interest which may have accrued thereon to the date of such payment, and shall thereupon receive from said mortgagee an assignment and transfer of said mortgage debt, with all security held by said mortgagee for the payment thereof.

The defendant insurance company, conceding its liability to the mortgagee under said mortgage clause, paid into court for the mortgagee the sum of $6,023.32, being the amount of the indebtedness secured by the mortgage held by the defendant building association against the insured property, and costs advanced, and prayed that it be subrogated to all of the rights of said building association as mortgagee. The sum paid into court was accepted by the mortgagee, and an assignment of mortgage made by mortgagee to the defendant insurance company. However, verdict having been returned for the plaintiff, the trial court, on entering judgment on the verdict, also entered decree canceling this mortgage.

The court properly instructed the jury that the burden was upon the plaintiff to prove, by a preponderance of the evidence, that the defendant consented to the assignment of the rights under the policy by Suchart to the plaintiff; but in the same connection qualified the instruction by adding thereto, "or that he made a full disclosure to the defendant company of the facts concerning the assignment and that the failure to complete the consent to the assignment before the fire was due to negligence

of the defendant or its agents." And by instruction No. 7, the jury were advised: "You are instructed that under the law of Nebraska, when an insurance policy is delivered to an insurance company for the purpose of securing its consent to an assignment of the interest of the insured therein, and the transfer of the insurance to another party, it is the duty of the insurance company to act within a reasonable time in the premises by either consenting to said assignment or notifying the insured that it will not consent, so as to enable him to procure other insurance."

Appellant contends that by these instructions an issue was interjected into the case that was not involved under the pleadings. This contention appears well founded. The question of negligence was not raised by the pleadings. The allegations of the plaintiff's petition as to that phase of the case being: "Which said assignment was duly accepted by the defendant Providence Washington Insurance Company and the consent of said insurance company to said assignment from John D. Suchart to the plaintiff herein, C. F. Connolly, trustee, was duly indorsed upon said insurance policy."

By the instruction referred to the trial court submitted to the jury, and gave the plaintiff the benefit of, an issue not raised by the pleadings. The submission of that issue was prejudicial to the rights of the defendant.

The appellant further contends that the verdict and judgment are not supported by the evidence. The vital question under the issues in this case was: Had the defendant insurance company consented to the assignment of the insurance policy by John D. Suchart to the plaintiff prior to the time the property was destroyed by fire? It is contended by the defendant that plaintiff concealed from defendant's agent, Wilson B. Reynolds, the fact that the fire had occurred which had destroyed the house and damaged the garage, until after the plaintiff had induced such agent to execute the company's consent to the as-

signment of the policy. The agent, Reynolds, called by the defendant, testified:

About 3 o'clock in the afternoon our office received a long distance telephone call from Omaha. Some one was speaking from the Omaha Loan & Building Association, and they referred to a policy that they wanted assigned; and I told them I had written a letter that morning in regard to that policy, and they asked if it had been mailed back to them. I told them no, that my letter would be self-explanatory; that I desired some information in regard to what this trusteeship was about. The gentleman who talked with me said that some one was coming out to see me about the assignment of this policy. Approximately an hour afterwards Mr. Connolly came to the office. He said he wanted to talk with me about this trusteeship and explain it to me. He said, "I can tell you all about it," so he went into a rather lengthy explanation. I then questioned him on matters pertaining to the tenant on the property, whether it was occupied or not. He said, "Yes." I said, "By a good reliable family?" He said, "Yes; so far as I know." He said so far as he knew there was nothing irregular about this; that the property was in good physical condition; that he was in close touch with it and that it was well rented and occupied. I thanked him for going into all the details concerning it, and I took this policy which had been filled in by some one, the assignment had, and I signed my name. I handed the policies to Mr. Connolly and he by that time was putting on his overcoat. Then he went outside of the railing and I had given him the policies. He stood there for just a moment or two before he left, and he said, "Well, Mr. Reynolds, I don't know how serious it is, but there was a fire on this property last night." I said, "Well then, I should say this assignment is of no benefit to you." I said, "I consented to it after the fire has occurred," and I said it should not govern. "Q. Did Mr. Connolly ever at any time, up to the time you had delivered to him the policies of insurance with

the consent to assignment indorsed on them, disclose to you that there had been a fire on the property? A. No, sir; not in any way. * * * Q. Did you ever execute the consent to the transfer of this until the afternoon of January 13? A. No; not until about 4:30 in the afternoon of January 13, 1931. Q. Which was after the fire occurred? A. After the fire occurred; yes, sir. Q. And before you knew that the fire had occurred, as a matter of fact? A. Yes, sir."

This witness is corroborated by the letter referred to in his testimony written to the Omaha Loan & Building Association prior to his receiving notice of the fire. The letter bears date of January 13, 1931, and reads: "Your letter addressed to W. L. O'Keefe has been referred to us for attention, together with the two policies. Before indorsing these policies to cover the interest of C. F. Connolly, trustee, please advise us fully as to the nature of the trusteeship, also how the property is occupied at the present time and what revenue it is bringing in."

On the same subject the plaintiff in his own behalf testified: I drove out to Fremont that afternoon; saw one of the Reynolds Brothers; told him about the fact that I was acting as trustee for the widow and child of Peter Duque De Estrada, and all about the rather peculiar history of the case, and about the fire. I told him that I had been under the impression the insurance was assigned a long time ago, but only happened to check it up on that particular day because we had a fire that morning, but that otherwise I would not have known anything about the failure to complete the insurance transference, because I had known nothing about there being any delay or the policies being sent to the wrong office. Well, as I recall, when I mentioned the fire, he said, "Just a little fire in one of the outbuildings?" I told him, "No; it was a fire in the main building, in the main residence." He said perhaps it was not important, and I told him that, as I understood it, it was a serious fire, but I did not know the extent of it. Well, he said, "As long as you

have made a good faith effort to transfer this insurance, the company will make no objection but will pay the money." He executed the consent to the assignment that day when I was out there. Some of this conversation was before the policy was actually delivered to me and some of it was after the policy was delivered to me. As to when he actually signed his name to the consent I do not know, because that was done in the back part of the office. The actual signing of his name was not done in my presence, the signing of his name as agent for the company. I met Mr. Reynolds on the one occasion, in his office, and some of the conversation was prior to the actual delivery of the policies to me; some was while I stood there holding them in my hand, and some of it was while I stood there with the policies in my pocket. Now, to pick out each portion of the conversation would be somewhat difficult. "Q. Then, you don't recall definitely whether you told him about the fire prior to the time he handed you the policies, indorsed with the consent to the assignment on them,—before you received the policies or after you received them, do you? A. It is my recollection that I told him that just as he handed me the policies, all in one transaction. Q. That is, right after he handed you the policies, then you told him there had been a fire on the premises? A. It is my idea that it was simultaneously. * * * Q. And during the course of that extended conversation, prior to the time the assignment was indorsed on the policy, did you at any time mention that there had been a fire on the premises? A. I can't tell you that definitely. It was all in the same interview, but I couldn't tell you whether I told him before he signed his name to the policies that there had been a fire, because I don't know when he signed his name to the policies, and I can't tell you whether I told him that before he handed them to me."

From a consideration of the evidence we conclude that plaintiff failed to sustain the burden of proof resting upon him. It is clear from the evidence that the agent of the

appellant never indorsed the consent of the company to the assignment of the insurance policy until after the fire. We conclude further, from the weight of the evidence, that at the time such consent was given the agent of the company did not know that a fire had already occurred, which had destroyed the residence and damaged the garage covered by the policy.

In this case the terms of the policy involved provide that the policy shall be void if any change take place in the interest or title to the subject of the insurance, other than by death of the insured, or if the policy be assigned before loss, unless the assent of the company shall be indorsed thereon or added thereto. Under such circumstances the general rule is that any assignment of the policy, to be valid and operative, must be with the consent of the insurance company. *Stephenson v. Germania Fire Ins. Co.*, 100 Neb. 456; *New England Loan & Trust Co. v. Kenneally*, 38 Neb. 895; *St. Paul Fire & Marine Ins. Co. v. Ruddy*, 299 Fed. 189. It appearing from the weight of evidence that the defendant company indorsed the assent to the assignment of the policy after the fire which destroyed the residence and damaged the garage in question, and without notice of such fire, its consent to such assignment is void. *Johnston v. Indiana & Ohio Live Stock Ins. Co.*, 94 Neb. 403.

It follows that the evidence was insufficient to sustain the verdict of the jury or the judgment of the trial court thereon, or to sustain the decree of the trial court canceling the mortgage held by the Omaha Loan & Building Association which had been assigned by that association to the insurance company.

The judgment and decree of the district court is therefore reversed and cause remanded.

REVERSED.

NORA MATTINGLY BURNHAM ET AL., APPELLANTS, V. CHARLES W. BENNISON ET AL., APPELLEES AND CROSS-APPELLEES: ELIAS MATTINGLY, CROSS-APPELLANT.

FILED MARCH 2, 1934. No. 28645.

1. **Wills**: AMBIGUITY. A latent ambiguity will ordinarily arise upon a will when it contains an erroneous description of the person named as beneficiary; as where no such person has ever existed as the one described.
2. ———: ———: EXTRINSIC EVIDENCE. In a proper case extrinsic evidence is admissible both to disclose and remove latent ambiguities in a will.
3. ———: ———: ———. Where a latent ambiguity consists of an erroneous description of a beneficiary, such erroneous description will not avoid the legacy if it can be struck out and from the remaining portion, together with proof dehors the instrument, the intended beneficiary clearly appears.
4. ———: ———. Where a legacy was made to one named and described by relationship on condition he appear and make proof of his identity within a time limited, it appearing no such person as the one described ever existed and that the person named was the one intended, *held*, under evidence outlined, that "identity" did not mean "relationship" and that testator did not intend that legatee establish the given relationship as a condition precedent to recovery.
5. **Fraud**: PROOF. "Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence." *Hampton v. Webster*, 56 Neb. 628.
6. **Wills**: CLAIMANTS: INTERVENTION: ISSUES. Where claimants of a legacy under one section of a will bring action to enforce such legacy, and a claimant under a separate section of said will intervenes for the purpose of enforcing the provisions of the second section, and neither the will nor the pleadings recite facts showing a conflict of interest between them, and the right to intervene is not questioned, plaintiffs cannot ordinarily resist intervener's claim nor object to evidence in support thereof; mere cross-denials are insufficient to establish an issue between them.
7. ———: TRUSTS: CONDITIONS: PERFORMANCE. Where beneficiaries under a trust in a will are required to appear and make proof to trustees within a certain time, and it appears that the beneficiaries named were able and offered within the

period specified to make such appearance and proof, but they were prevented from so doing by the trustees who were residuary legatees and would profit by their failure, it shall be accounted as performance.

8. Trusts: TRUSTEES: LIABILITY. Where trustees under a will assume to act as such, but unreasonably neglect to reduce the trust estate to possession as required and unduly delay determination of the identity of the beneficiaries named, such trustees are personally liable to the beneficiaries for any resulting loss, including interest.

APPEAL from the district court for Butler county: HARRY D. LANDIS, JUDGE. *Reversed, with directions.*

James E. Brittain and *Deutsch & Stevens,* for appellants.

Perry, Van Pelt & Marti and *L. B. Fuller,* for cross-appellant Mattingly.

Thomas & Vail, contra.

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY and MEYER, District Judges.

MEYER, District Judge.

George W. Mattingly, colored, died testate, in Butler county, Nebraska, April 17, 1924. His will, dated March 24, 1924, was duly probated in said county. April 16, 1926, plaintiffs commenced an action in the district court for Butler county, Nebraska, to enforce the provisions of a testamentary trust, provided in said will. Issues were joined and on April 28, 1930, trial on the merits having commenced, defendants interposed a demurrer *ore tenus,* which was sustained. Plaintiffs electing to stand upon their petition and refusing to plead further, the petition was dismissed. Plaintiffs appealed to this court, and in *Burnham v. Bennison,* 121 Neb. 291, the judgment of the lower court was reversed, with directions.

Plaintiffs, by permission, filed an amended and supplemental petition in which is set out a copy of said will. The residuary clause thereof, so far as is material to this controversy, provided: "(6) The rest, residue and re-

mainder of my estate, real and personal, wheresoever situated, I give, devise and bequeath to C. W. Bennison and I. T. McCaskey as trustees, upon the following trusts, to wit: (a) That my said trustees shall pay to Joseph Mattingly, a son of a half-brother of my father, the sum of $10,000, on condition and in the event that the said Mattingly is living at my death and appears and makes due proof of his identity to my said trustees within one year after my death; and if the said Joseph Mattingly is dead or fails to appear then and in that event such payment shall be made to his living children, if any he has, on condition and in event that his child or children appear and make due proof to said trustees of their relationship within two years after my death; and if the said Joseph Mattingly fails so to appear and make such proof within one year, and if also, his child or children fail to so appear and make proof of their relationship within two years after my death, then the provisions of this paragraph made shall lapse and be null and void. (b) That my said trustees shall pay Elias Mattingly, the son of a half-brother of my father, the sum of $10,000, if the said Elias Mattingly is living at my death and he appear and make due proof of his relationship to said trustees within one year after my death; and if the said Elias Mattingly is dead or in case he fail to make the aforesaid proof and appearance then my said trustees shall pay said sum to his child or children, if any there are, appearing and making proof to said trustees of his or their relationship within two years after my death and in case of the said Elias Mattingly dying or failing to appear and in case of his child or children, if any he has, failing to appear and make proof as aforesaid, then and in that event the provisions of this paragraph in behalf of said Elias Mattingly and his child or children shall automatically lapse and be null and void. (c) My said trustees shall, during the term of said trust, cumulate the net income of said estate until the two-year period after my death has elapsed and my said trustees are then directed to assign, transfer and

set over to C. W. Bennison and I. T. McCaskey of David City, Nebraska, in equal shares, the rest, residue and remainder of the property remaining in the hands of said trustees and to vest in the said C. W. Bennison and I. T. McCaskey the absolute title thereto; my intention being to give, bequeath and devise to said C. W. Bennison and I. T. McCaskey all of such residue absolutely and unconditionally."

Plaintiffs aver in substance that the Joseph Mattingly mentioned, described and intended under the provisions of section (a) of paragraph (6) of said will (if alive) died March 19, 1919; that plaintiffs are his only children (or descendants); that within the two-year period prescribed, plaintiffs appeared before the trustees named and tendered competent evidence and proof thereof; that the trustees have failed and still fail and decline to receive or hear said proof and fail to determine the facts as contemplated; that on the last day of the two-year period designated, plaintiffs filed their petition in this action, and that said trustees have an interest in said estate adverse to said trust and are not suitable persons to act as trustees.

In December, 1931, Elias Mattingly intervened, alleging that there is a latent ambiguity in paragraph (6) of said will in that Elias Mattingly is therein described as a son of a half-brother of testator's father instead of a son of an uncle of testator; that testator's father had no brother or half-brother at any time, and intervener says he is the person named and intended under section (b) of paragraph (6) of said will.

In their answer, defendants admitted that the plaintiffs are the children of Joseph Mattingly, now deceased, and alleged that the testator firmly believed that Joseph Mattingly was the son of a half-brother of the father of testator, but allege that he was not related to the testator in any manner and that deceased's father never had a brother or a half-brother; that said bequests were intended solely for such persons as were related to the

testator in the manner described and that the existence of such blood relationship is a condition precedent to the right of any beneficiary to take such bequest. They further say that, if plaintiffs are the persons referred to in said will, said provision is null and void, for the reason that same was induced by fraud and deceit practiced on the testator by the plaintiffs and their father and their fraudulent failure to disclose their lack of relationship to him.

At the trial below the court found for defendants. Plaintiffs and intervener have appealed.

Are claimants the parties named, described and intended as beneficiaries?

The record is voluminous. It discloses that the testator was an ex-slave, born in Kentucky in 1841. His mother was a negro slave named Jane, owned by one Ray, and his father was a negro named Pius, originally owned as a slave by William Mattingly, but subsequently manumitted. The mother of Pius was a negro slave owned by said William Mattingly and the father was reputed to be a Charles Mattingly, a white man. Testator enlisted in the federal forces during the Civil War under the name of George W. Ray and apparently continued to use his mother's name until about the time he came to Nebraska. In 1878 he had removed to Butler county where he continued to reside until his death. He married in 1887 and in 1908 his wife died. There were no children. At the time of his death he owned real estate and personal property of considerable value.

Joseph Mattingly, father of plaintiffs, was also born in Kentucky about 1849 and was raised in a Louisville, Kentucky, orphanage. He was a white man, but little is known of his parentage. Despite the racial difference, the claimed relationship was not impossible in view of the irregular parentage of George's father and Charles' propensities. A son of Charles Mattingly by another woman would have been a half-brother of testator's father and, had he had a son, such son, if white, would answer

the designated relationship. While it is disputed, the plaintiff Noah Mattingly testified that testator and his father knew each other in Kentucky following the Civil War. Shortly after becoming of age, Joseph Mattingly went to Indiana where he was married. Afterwards he lived in Illinois and in the early nineties moved to Butler county, Nebraska. For a time he leased testator's farm and testator often visited Joseph and had meals with him and his family at their home. In 1895 or 1896 Joseph moved to Council Bluffs, at which time testator gave him $400. Later, Noah Mattingly made several trips to Butler county in connection with his employment and visited the testator at his home, and just before Noah was married testator gave him a mare. Although unable to read or write, testator occasionally corresponded with Joseph and his family through defendant Bennison and he often talked to Josh and Blanch Coleman, with whom he lived, and others, about Joseph and the children and called and referred to them as his cousins and, as they say, told about the good times they had had together when they used to live on his farm. He also told Noah a number of times that they were related and that some time he would disclose the relationship and that he was going to take care of Noah's father and his children.

As against this evidence, Noah testified on cross-examination that he and his family never claimed to be related to testator. Subsequently, however, as a part of the same cross-examination, when asked why he visited George so often and if it was because he thought he was his cousin, Noah said, "Well, I always figured that he was some relation to me." Considering his entire evidence, we do not understand that he intended to disclaim such relationship. It is easily understandable that white persons would be hesitant about claiming relationship to a negro.

There is, however, evidence in depositions of residents of Kentucky introduced by the intervener, and some of which were reoffered by the defendants, to the effect that

Charles Mattingly, although married, never had a white son. The deposition evidence discloses that, if Joseph Mattingly did not bear the claimed relationship, there never was any such person as the one described, and it is practically conceded by defendants that plaintiffs' father is the person named and intended. A latent ambiguity resulting from what may be an erroneous description of relationship is thus indicated and the question arises whether the legatee was in fact erroneously described. A latent ambiguity will arise upon a will when it contains an erroneous description of the person named as legatee, as where there is no such person as the one described, unless from an examination of the whole will it clearly appears that the testator intended that such legatee answer the precise description therein set out as a condition precedent to recovery. See *Second United Presbyterian Church v. First United Presbyterian Church,* 71 Neb. 563; *Patch v. White,* 117 U. S. 210; *In re Henrikson's Estate,* 163 Minn. 176. Also see *Siegley v. Simpson,* 73 Wash. 69, 47 L. R. A. n. s. 514, and notes. These same authorities hold that in cases of latent ambiguity extrinsic evidence may be considered both to disclose and remove such ambiguity. See, also, 40 Cyc. 1430; *St. James Orphan Asylum v. Shelby,* 75 Neb. 591; *Taylor v. McCowen,* 154 Cal. 798.

The parol evidence further shows that in 1919 the deceased made a will in which he conveyed one-half his estate in trust for his brother, John Ray, on condition that, if he be not found within two years, then to Joseph Mattingly, "who formerly lived on my farm, in this, the county of Butler, state of Nebraska." No other Joseph Mattingly ever lived there. Later testator went to Kentucky in an attempt to find his brother. Being unsuccessful and apparently giving him up as dead, he subsequently made the will in question. It also appears that, after leaving Council Bluffs, Joseph Mattingly lived near Sholes in northeastern Nebraska, and testator told the scrivener who drew his will that Joseph Mattingly who

lived on the Dakota line was the son of a half-brother of his father, and when section (a) of the will was read to him, the testator, upon inquiry, referred to Joseph Mattingly as "first cousin in north Nebraska or Dakota." But defendants urge that plaintiffs' father was not the Joseph Mattingly intended because testator knew that Joseph was dead at the time he made his will. He had been told of Joseph's death, but he forgot or became uncertain on this point during his last days. He was then 83 years old and in ill health. Uncertainty is indicated by the fact that he made the bequest over to Joseph's children. Defendants, however, are estopped to urge this objection by reason of their answer, and, indeed, in their brief they state: "The fact that the testator believed he was related by blood to the plaintiffs and their father was not a disputed issue in the case."

Elias Mattingly, intervener, is a son of one Henry F. Mattingly, a brother of Charles, the father of Pius. He is also white and was born in Kentucky in 1840 and he and deceased lived in houses a short distance apart. They were baptized in the same church, played and worked together as boys and young men, and Elias still lives in the same house where he was born. Deceased told Crosthwaite, one of the attesting witnesses, that Elias Mattingly named therein lived back in Kentucky. He also told the Colemans that he had a cousin in Kentucky, and told others he was part white. Testator was illiterate; he had not been in close touch with his relatives for years; his father's birth was irregular and he might easily have been mistaken as to the precise relationship. There is no evidence that he ever knew any other Joseph or Elias Mattingly or that any others ever existed either in Nebraska or Kentucky or elsewhere. Deceased has now been dead nearly ten years and there is no other Joseph or Elias Mattingly or any one of any other name or relationship claiming either of these legacies. The defendant trustees alone ask for their forfeiture. These defendants were testator's business advisors. They are not

relatives, but are residuary legatees and would profit thereby. If we exclude the plaintiffs, Elias Mattingly was testator's nearest living relative. The evidence of the surrounding circumstances, taken in connection with the will itself, leads inevitably to the conclusion that both plaintiffs' father and intervener were the persons named and intended by testator as the objects of his bounty and it is undisputed that plaintiffs are Joseph's only children and descendants.

Did testator by the conditional provisions stated in the will intend that legatees establish the precise relationship therein set out as a condition precedent to recovery, and was relationship the sole motive for said bequest? The will does not so state, nor do we think that this was what testator meant by the language used. Joseph Mattingly was only required to establish his "identity," while Elias Mattingly was required to establish his "relationship." The word identity is not synonymous with the word relationship, nor is it commonly so used, and where two words of a different meaning are used in the same instrument, they are presumed to have been used advisedly and not synonymously. Again, even if relationship was the sole motive, when it is admitted that testator "firmly believed" that Joseph Mattingly was a relative, and there is no evidence that there was any doubt in his mind on this point, why would he require proof of relationship in which he had full faith?

Plaintiffs are required to make proof of their relationship, but since testator believed thoroughly in said relationship, we think he meant only that they establish their relationship to Joseph. This construction does no violence to the language used. Elias' relationship is not disputed, but defendants contend that claimants must prove the exact relationship described in the will. Had the language been "such identity" and "such relationship" instead of "his identity" and "his relationship," or had he made these gifts on the condition that they prove

themselves to be sons "of a half-brother of my father," then the situation might be different.

The scrivener who drew the will said that testator "wasn't a versatile fellow; his mind was slow and he didn't talk much; everything I got out of him I had to inquire about pretty much." He also stated that he "pressed" testator for the relationship in order to get a description of who was actually intended and that he "tried to search out from him who they were and how they could be identified." He made a memorandum of the evidence gleaned for the purpose of drawing the will. There is no suggestion in it of any conditions precedent to the payment of the money, nor does it even disclose the relationship described in the will. The language used was the scrivener's language, and while testator adopted it, the surrounding circumstances support the foregoing construction.

The evidence tends to show that the motive for the legacy to Elias was that of relationship. However, it does not indicate that testator attached a peculiar importance to the precise relationship or that he would not have made said gift had he had it in mind that Elias was a son of a great uncle rather than a son of a half-brother of his father. There had been a rather close association between testator and Joseph for a considerable period of time, and while in making the gift to him there is evidence he was actuated by a belief of relationship, we are unable to determine that this was his sole motive. He remembered others who were not related and we cannot say that, aside from such relationship or his belief in it, he would have preferred this legacy to go to the residuary legatees, who it is admitted bear no relationship. We believe there is a latent ambiguity arising on the will resulting from an erroneous description. This renders parol testimony admissible, and the rule stated in *Patch v. White, supra,* and quoted with approval in *In re Henrikson's Estate, supra,* is applicable here: "If the misdescription can be struck out, and enough remain in the

will to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected." See, also, *Seebrock v. Fedawa*, 33 Neb. 413; Jones, Evidence (2d ed.) sec. 474.

We next consider whether plaintiffs and their father fraudulently induced testator to believe they were related and to make the bequest to them. Defendants admit there is no direct evidence of fraud, but point out that, when testator told Noah that they were related, he did not deny it, and they say that this and the fact that he visited testator and the course of conduct of plaintiffs and their father indicate a studied effort to induce testator to believe they were related and to make a bequest to them, and to conceal the true facts. We think the evidence insufficient to establish such design, nor does it show that testator was influenced by their conduct. None of them except Noah saw testator after 1896. Thereafter he was in Kentucky seeking out his relatives. Apparently his belief in such relationship was of long standing. The only assertions of relationship in the record were made by testator himself. There is nothing to show that Joseph or any plaintiff ever made any such statement or representation either in writing or otherwise. Their correspondence with testator passed through the hands of the defendant Bennison and there is no suggestion that there was anything in it to support this charge. "Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence." *Hampton v. Webster*, 56 Neb. 628.

As a general rule, to establish concealment, it must first be shown that the parties charged therewith had knowledge of the facts which it is claimed they concealed or means of knowledge which are not open to both parties alike. 12 R. C. L. 309, sec. 69. Except for Noah's statement earlier discussed, there is no evidence that plaintiffs or their father knew or believed that they were not related and in their petition plaintiffs allege they were related. The evidence indicates testator's means of knowl-

edge was superior to theirs. The trial court found specially for plaintiffs on this issue and with this finding we agree.

Next we consider certain cross-assignments of error. In their answer to the petition in intervention, plaintiffs allege that intervener's claim, if any, had been settled, and that such petition was filed in furtherance of a conspiracy with defendants to harass plaintiffs and defeat their claim. It is noted that defendants did not object to intervener's evidence and they have not answered his brief in this court. It is also shown that negotiations were had looking toward adjustment of his claim, but it does not appear that settlement was reached. While the record reflects many circumstances indicating some favoritism, it fails to show that intervener's petition is not presented in entire good faith.

As heretofore stated, certain depositions were offered by intervener in support of his claim and some of them were reoffered by defendants. Plaintiffs complain that these depositions were improperly received under either offer, over their objections stated at the time of trial, to wit: That said depositions were not taken in the instant case, but were taken in other cases involving different parties and issues, cases in which plaintiffs had no substantial interest and no opportunity to cross-examine, and other grounds. Intervener and defendants, on the other hand, contend that the depositions were all taken in former suits involving substantially the same parties or their privies and the same subject-matter and were therefore competent. The defendants did not object to these depositions when offered by intervener. They were therefore properly received in evidence and entitled to be considered in support of intervener's claim as against the defendants.

Plaintiffs first complain of these depositions because of their possible adverse effect on plaintiffs' claim. The only evidence in them that could be considered detrimental to plaintiffs was the evidence, previously referred to, tending to establish that plaintiffs' father did not bear the

relationship to the testator described in the will. However, as already shown, if their admission under either offer was erroneous because of such evidence, it was error without prejudice. Plaintiffs' second and chief reason for urging the incompetency of these depositions lies in the claim that sufficient funds may not be realized from said estate to pay both legacies in full. While their objections are urged with considerable insistency and they outstrip defendants in their resistance of intervener's proof, their position on this phase of the controversy is frankly indicated by the following statement as it appears in their brief: "Except for the depletion of the fund and such adverse testimony as may be reflected in these exhibits, there is no controversy between cross-appellant and the appellants." The pleadings raise no issue between plaintiff and intervener other than the issue based on the claim that intervener's petition was not filed in good faith, heretofore discussed, nor does the will itself reflect a conflict of interest between them. Counsel in their brief state that the question of priority is not involved in this action and the right to intervene was not questioned. It should also be noted that plaintiffs' objection to these depositions when they were offered at the trial did not include the grounds now urged, nor does the evidence establish that there will be a deficiency of funds. We do not think, then, that the plaintiffs are entitled, under the record, to resist the allowance of intervener's claim or to object to evidence in support thereof; mere cross-denials were not sufficient to raise an issue between them. There is no error in the record on this point of which the plaintiffs can rightfully complain.

Have plaintiffs and intervener complied with the requirements of said will to appear and submit proof within two years and one year, respectively, after testator's death?

The evidence discloses that several times prior to the expiration of the two-year period, plaintiffs offered, both orally and in writing, to appear before trustees at any

time convenient to them and make proof as required by said will, and vigorously urged that they be given an opportunity to do so. Each offer was ignored and trustees never did appoint a time or place for hearing and never did hear proof under such claim, but finally, through their attorney, suggested that plaintiffs go into court and establish their identity. As stated in the former opinion, *Burnham v. Bennison, supra:* "When the evidence and proof were tendered within the two-year period, it was the plain duty of the trustees to hear the same and proceed as contemplated by the testator." These same trustees would, as individuals, succeed to the bequest in the event of a forfeiture for failure to comply with the conditional requirements. Their actions smack of self-interest and, even if their failure to act was prompted by an honest belief that plaintiffs were not the parties intended under said will, yet it would seem that plaintiffs' interests ought not be adversely affected by their erroneous judgment and that they ought not be permitted to profit by their own wrong.

This is a suit in equity to enforce a trust under a will, and not a suit against an executor to recover a legacy. If real estate is devised, subject to a condition precedent, which becomes impossible of performance before the time of performance arises, the title to it will not vest in the devisee. However, it is held otherwise as to a legacy subject to a condition precedent. See *Nunnery v. Carter,* 5 Jones Eq. (N. Car.) 370, 78 Am. Dec. 231; *Burdis v. Burdis,* 96 Va. 81. And in *Harris v. Wright,* 118 N. Car. 422, where there was a devise of real property, it was held that one should not be allowed to defeat an interest under a will where by his own wrongful act he prevented claimant from performing the condition upon which his interest rested. The court said: "We are not weakening that principle of law" which requires unconditional performance of conditions precedent, "but we are asserting another rule equally as old and equally as binding when we declare that, where a person interested wrongfully

prevents the performance of the condition precedent, he shall not be allowed to take advantage of his own wrong." See, also, *Morris v. Mull*, 110 Ohio St. 623, 39 A. L. R. 323; *Hill v. Gianelli*, 221 Ill. 286; *Peek v. Woman's Home Missionary Society*, 304 Ill. 427, 26 A. L. R. 917; *Seeley v. Hincks*, 65 Conn. 1. In the latter case the court said that, plaintiff therein being ready and willing to do what was required of him, but being prevented from so doing by the executors, it was accounted to him as performance. The rules quoted, we think, are peculiarly applicable to the facts of this case, and plaintiffs now having made proof that they were the parties intended and having been prevented from appearing and making such proof within the time required, by trustees who would profit thereby, it will be "accounted to them as performance."

So far as intervener is concerned, it appears that a number of contests were originally filed against this will, and the trustees, as proponents thereof and beneficiaries thereunder, within the one-year period caused intervener to appear and give evidence in the form of deposition for use in their behalf in said contest; that he then testified as to his identity and relationship to testator and gave the family history of deceased. There also appears in evidence an envelope directed to "C. W. Bennison and I. T. McCaskey, Executors and Trustees, David City, Nebraska," duly stamped and canceled and postmarked in Kentucky and showing post office cancelation, "David City, Nebraska, April 3, 1925, Registered," and also an affidavit of claim of Elias Mattingly apparently transmitted in the envelope, dated April 1, 1925, in which is set forth proof of his relationship and his identity. The defendant Bennison testified that he turned over all papers in connection with the trust to his counsel, and counsel testified that he was familiar with the contents of said exhibit and saw it among the files in the county court. The foundation proof for the admission of the envelope and affidavit was very meagre; however, defendants did not object thereto, and, for reasons heretofore stated,

plaintiffs' objections cannot be urged. The evidence will therefore be received and considered, and shows *prima facie* that this proof was made within the time required. The proof was ample, and we think that, when intervener appeared at instance of trustees and gave his deposition for them as outlined, and supplemented same by proof and formal claim in the form of affidavit, he fulfilled, within time, the conditional requirements.

Trustees are also charged with breach of trust, and judgment is asked against them personally, as well as against the trust estate, and claim is made against each for interest. In *Lewis v. Barkley*, 91 Neb. 127, it was held that, whether interest is to be allowed upon a specific legacy of money depends upon the intention of the testator, and that, if the intention cannot be otherwise determined from the language of the will, it will be presumed that the testator intended that the legacy should be paid during the first year after the appointment of the executor under the will, and if not so paid, should bear interest from that time. In the instant case there is nothing to indicate testator intended the bequests to draw interest before they were demandable and the will clearly shows that he expected payment to be made within two years following his death. However, there was litigation pending over this will almost continuously to November 12, 1929. This was not contemplated by testator. By January 1, 1931, at least, trustees could have reduced the estate to possession and converted it into cash and have been prepared to pay these bequests. Under the circumstances of this case, such time is allowed and interest is therefore charged at 7 per cent. on each legacy from January 1, 1931.

As pointed out in the former opinion, there was a conflict of interest between trustees and claimants. If trustees desired to assume the role of contestants, they should have resigned and petitioned the court for appointment of successors to hear and determine claims. Choosing to act as trustees, it was clearly their duty to reduce the estate

to possession as soon as possible after the death of the testator and either hear and fairly determine the evidence offered by plaintiffs and intervener or secure a judicial determination thereof. Had this been promptly done, the bequests could have been paid at least by January 1, 1931, as outlined above. After litigation was ended in 1929, there was no further excuse for their failure to act; however, in the role of contestants they have continued to unduly delay an early determination of claimants' rights. Even if not prompted by ulterior purpose or personal interest, they have woefully neglected their duties as trustees and they are personally liable for any resulting loss. 39 Cyc. 321; *Kline's Estate,* 280 Pa. St. 41, 32 A. L. R. 926; *Baird v. Lane,* 115 Neb. 413. We have examined the evidence carefully and are unable to determine that there has been any loss to the estate by their neglect, except perhaps a possible loss of interest due to delay, for which interest they are chargeable in the event of a deficiency in the trust estate. If sufficient funds cannot be realized from the trust estate to pay the face of the bequests in full, then the interest chargeable to trustees should be computed on the principal payable.

Trustees are not only liable for interest, but they may not be permitted to charge the trust estate, to the prejudice of the claimants, for any expenses, costs, or attorneys' fees incurred in this litigation, or for any expense, costs, or attorneys' fees incurred or services performed by them in their individual interest, rather than in the interest of the trust.

After the hearing in the trial court, by suggestion of counsel for trustees, and in keeping with the mandate of this court made on former hearing, the trial court entered an order appointing new trustees and removing those originally designated. Plaintiffs complain that the newly appointed trustees are disqualified by interest to act, and that their appointment was made without notice to plaintiffs. While the trustees appointed should clearly be impartial between all the parties, the record does not dis-

close that the newly appointed trustees lack such qualifications, and we fail to find in the record any evidence on the question of notice, but if notice was omitted no prejudice appears. Under the state of the record, we do not think we should disturb the order of the trial court in this regard.

It follows that the judgment of the trial court must be and the same hereby is reversed and the cause remanded to the district court, with instructions to enter judgment in conformity with this opinion.

REVERSED.

GOOD, J., dissents.

LINCOLN TELEPHONE & TELEGRAPH COMPANY, PLAINTIFF, V. WILLIAM ALBERS, COUNTY TREASURER, DEFENDANT.

FILED MARCH 3, 1934. No. 29111.

Taxation. General personal taxes may be paid in two equal instalments. The first instalment becomes delinquent December first after such tax has been levied. If the first instalment is paid before it becomes delinquent, the second instalment does not become delinquent or bear interest until the first day of the following July.

Original proceeding for a declaratory judgment as to time and manner of payment of personal taxes.

Woods, Woods & Aitken, for plaintiff.

Paul F. Good, Attorney General, and *Daniel Stubbs,* for defendant.

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and CHAPPELL and REDICK, District Judges.

GOOD, J.

This is an action for a declaratory judgment. The question presented for determination is: Where the first instalment of personal taxes has been paid before such

instalment becomes delinquent, does the second instalment of taxes bear interest from the date the first instalment would have been delinquent, if not paid, or from the date that the second instalment becomes delinquent? The question hinges upon a proper interpretation of chapter 134, Laws 1933, and section 3, ch. 136, Laws 1933.

Chapter 134, Laws 1933, in so far as applicable to the question before us, reads as follows: "All general personal property taxes levied for the state of Nebraska, or for any county, city, village, school district, or other political subdivision therein, shall become due and payable on the first day of November next following the date of levy thereof. One-half thereof shall become delinquent on the first day of December next following the date on which the tax becomes due and payable. The second half thereof shall become delinquent on the first day of July next following the date on which the tax becomes due and payable; provided, however, if the first one-half of such tax be not paid on or before the first day of December then and in that event the entire tax shall become delinquent on the first day of December next following the date on which the tax becomes due and payable. All delinquent taxes shall draw interest at the rate of seven per cent. per annum from the date on which they become delinquent until the date of sale, in case of real property, and until the date upon which distress warrants may issue, in case of personal property. * * * And delinquent taxes on personal property shall draw interest at the rate of ten per cent. per annum from the date upon which distress warrant may lawfully be issued."

Section 3, ch. 136, Laws 1933, reads as follows: "The county treasurer is hereby required, during the month of December of each year after the personal taxes for the year have become delinquent on account of such taxpayer not having paid said personal taxes or the first instalment thereof on December first, as required by law, to notify by mail all persons of the amount of their delinquent personal tax, and that unless the same is paid by Feb-

ruary 1st next following, distress warrant will be issued therefor. The treasurer shall, on the first day of March next after the personal taxes for the last preceding year have become delinquent, collect the same, together with interest and costs of collection, by distress and sale of personal property belonging to the person against whom levied in the manner provided by law for the levy and sale of personal property on execution. Distress warrants shall be issued against all persons having delinquent personal tax for each year, and each such warrant shall include all delinquent personal taxes of the person against whom issued, unless such person shall, on or before March 1st, file with the treasurer an affidavit that he is unable, by reason of poverty, to pay any such tax, in which case distress warrants shall not issue until ordered by the county board, or unless such person shall, on or before March 1st have paid delinquent personal taxes in full with interest at the rate of seven per cent. (7%) per annum or has paid the first instalment of said personal taxes on or before March 1st with interest at the rate of seven per cent. (7%) per annum; provided, if such person, having paid the first instalment of personal taxes on March 1st, as aforesaid, shall fail, refuse or neglect to pay the second instalment of personal taxes due September 1st, then and thereafter distress warrant shall be issued for the amount of the personal taxes due as of September 1st with interest at the rate of nine (9%) per cent. per annum from March 1st until satisfied by distress warrant or otherwise paid."

Chapter 134 and chapter 136 were each enacted at the same session of the legislature. Chapter 134 was approved by the governor on May 10, 1933; chapter 136 was approved May 12, 1933, and contained an emergency clause, while chapter 134 did not contain an emergency clause.

It is contended that there is inconsistency between the two acts, and that when said chapter 136 was enacted there was no provision for paying personal taxes in in-

stalments, because chapter 134 did not become a law until three months after final adjournment of the legislative session at which it was passed, as provided by the Constitution.

We are of the opinion that the two acts, represented by said chapters 134 and 136, were enacted as companion laws, and while an emergency clause was included in chapter 136, it could not operate on the taxes for 1932, and was inoperative until the tax for 1933 was levied, which was not until after chapter 134 was in force.

We are of the opinion that the legislature had power to enact chapter 136, Laws 1933, and that it would become a law, although not operative until there was further legislation. There was then no statute authorizing payment of personal taxes in instalments, but it would become operative and effective when another act was passed providing for the payment of personal taxes in instalments. Chapters 134 and 136 should be construed together and each given effect if possible. A careful examination of chapter 134 and section 3 of chapter 136 does not disclose any inconsistency with reference to the payment of personal taxes in instalments. Chapter 134 provides specifically for the payment of such taxes in instalments and fixes the time when each instalment will become delinquent. Section 3 of chapter 136 deals exclusively with the manner of enforcing payment of personal taxes after they have become delinquent.

We are of the opinion that a taxpayer may lawfully pay his personal taxes in two equal instalments, as provided by chapter 134, Laws 1933, and that, if he pays the first instalment on or before the first day of December following the levy of such tax, then the second instalment does not become delinquent and does not bear interest until the first day of the following July.

Our attention has been called to the fact that there are provisions in some of the home rule charters of cities which make other and different provisions respecting the collection of city taxes in such cities. Whether those pro-

visions are in conflict with the provisions of said chapters 134 and 136, and which would be controlling, is not involved in this action and is not here decided.

From what has been said, it follows that it is the duty of defendant county treasurer to accept and issue receipts for personal taxes in instalments, and to refrain from collecting any interest where such instalments are paid on or before the date they become delinquent.

JAMES V. CHIZEK, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES: MARK M. SHAW, INTERVENER, APPELLANT.

FILED MARCH 3, 1934. No. 28884.

1. **Equity.** The facts in the instant case invoke the application of the rule that "Equity acts in the present tense, and that relief is dependent upon present and future conditions rather than solely on those existing when the suit was brought." 32 C. J. 76.
2. **Injunction.** One who seeks the extraordinary remedy of injunction must establish by competent evidence every controverted fact necessary to entitle the party to the relief to be granted.
3. **Nuisance: INJUNCTION.** A private person seeking the aid of equity to restrain a public nuisance must show some special injury peculiar to himself aside from and independent of the general injury to the public.
4. **Municipal Corporations: FRANCHISES: INJUNCTION.** An action cannot be maintained by a private person to prevent gas mains being laid in the streets of a city unless he pleads and proves that some special injury will result to him.
5. **Evidence** examined, and *held* to establish that the transactions attacked do not affect injuriously the business of the Metropolitan Utilities District or the proprietary rights of the city of Omaha; and neither do they entail any expenditure of public funds or involve an increase in the burden of municipal taxation.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Benjamin S. Baker, Edward Shafton, John A. McKenzie and *Edgar S. Hickey,* for appellants.

Seymour L. Smith, Kennedy, Holland & De Lacy, Thomas Creigh, John A. McKee, Flansburg, Lee & Sheldahl, R. J. Organ, L. J. Te Poel, Philip Klutznick and *Dana B. Van Dusen, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and HASTINGS, District Judge.

EBERLY, J.

This is a suit in equity commenced and prosecuted in the district court for Douglas county by James V. Chizek as plaintiff against the city of Omaha, its mayor and council, Herman Beal as city engineer, the Metropolitan Utilities District, the Northern Gas & Pipe Line Company, and also four named corporations engaged in the packing house business within said city. Mark M. Shaw became a party to this proceeding by intervention. The relief sought by plaintiff, and also by intervener, speaking generally, may be said to be the prevention of the laying of a gas main in the public streets from the southern corporate limits of the city of Omaha at Twenty-seventh street to the packing houses owned and operated by the defendants designated in the pleadings and located in the vicinity of Twenty-sixth and Twenty-seventh streets at Q street, and to prohibit the transportation of natural gas through said gas main for private purposes to the defendant packing companies. No temporary injunction or restraining order was applied for. The several defendants answered and replies thereto were filed. On the issues thus formed a trial was had on the merits on February 4, 1933, at the close of which a judgment was entered denying injunctive relief and dismissing the action. From the order of the district court overruling his motion for a new trial, the plaintiff alone appeals, filing the transcript of the proceedings in this court on June 2, 1933.

Upon this appeal, so far as necessary, this court retries

the issues of fact and law presented by the record *de novo*, and reaches an independent conclusion without reference to the conclusion reached in the district court. Comp. St. 1929, sec. 20-1925.

The record discloses the fact that at the time of the trial in the district court the improvement sought to be enjoined had been completed and was in operation. The results of this situation appear in the record in practically uncontradicted evidence. That this controversy may be considered with reference to the environment from which it arises, it may be said that the Northern Gas & Pipe Line Company is the owner of a pipe line extending from the natural gas fields of Texas and Kansas to, into and through Nebraska. The company's business is the preparation and transportation of natural gas through this pipe line, and the sale of the same at wholesale to such as desire to purchase. Under contracts it now furnishes such natural gas for a limited use to the four defendant packing companies. The delivery of this product is made to these purchasers through a meter which registers the amount as delivery is made, and which is situated outside of the city of Omaha. This pipe line company is paid on the basis of the amount of gas passing through this meter.

Under a "permit" in writing, and in accordance with the plans and specifications fully approved by all the municipal authorities concerned, the four packing house companies constructed at their own cost, and have installed some five feet under ground, a gas main eighteen inches in diameter from the south boundary of the city of Omaha along Twenty-seventh street and in Twenty-sixth street and Q street to their several packing plants. The gas thus delivered is again metered at the point of receipt in the plant supplied and there measured to ascertain the relative amount to be contributed by such defendant for the purchase price as determined by the meter installed at the city boundary. Contracts in writing by the parties in interest provide that the packing house companies shall

continue to buy manufactured gas from the Metropolitan Utilities District as heretofore; that natural gas furnished through this pipe line would be used by the packing house companies for fuel purposes only; and that there would be no resale of any of the natural gas by the packers. So far as shown in the evidence none of these contract provisions has been breached.

The evidence is also undisputed that the use of manufactured gas for the purposes for which the natural gas is now employed, or may be employed under the terms of the contracts referred to, is an economic impossibility, so that there is no competition with the products of the Metropolitan Utilities District created by the transaction before us.

In view of the situation presented by the record, we are fully justified in determining the question before us on a consideration of the actual results of the transactions on which plaintiff's attack was made.

"It has been said that equity acts in the present tense, and that relief is dependent upon present and future conditions rather than solely on those existing when the suit was brought." 32 C. J. 76. See, also, *Youngblood v. Incorporated Town of Wewoka*, 95 Okla. 28; *Wendell v. City of Peoria*, 274 Ill. 613; *Detroit United Ry. v. City of Detroit*, 214 Mich. 170; *Fugel v. Becker*, 2 S. W. (2d) (Mo.) 743; *Alsager v. Peterson*, 31 S. Dak. 452.

It is not denied that this pipe line was laid and the street, including the pavement thereon, fully restored so that it in no manner affects public travel thereon. This was done at the cost and expense of the defendant packing house companies, and with no damages whatever to either public corporation defendant within whose limits the work was performed.

It also appears that by a deed in writing the defendant packing houses conveyed this pipe line to the Metropolitan Utilities District of Omaha, reserving, however, the full and free use of the pipe line for the period of six years, at the end of which time all reserved right of use shall

terminate; further, that this deed had been accepted and recorded by the grantee prior to the final hearing in the trial court.

As to the general financial effect of this transaction, Mr. Robinson, the chief engineer for the Metropolitan Utilities District, testifies, in substance, that he was familiar with all of the property belonging to the Metropolitan Utilities District, and that the pipe line which was placed in Twenty-seventh street by the defendant packers and which was deeded to the Metropolitan Utilities District on January 18, 1932, was worth approximately $50,000; that the pipe line in Twenty-seventh street provides a way for the carrying of manufactured gas to the southern limits of the city, and that this condition will be advantageous to the city and the district, and furthermore obtains potential customers for the large use of natural gas for industrial value; and that there are no disadvantages to the Metropolitan Utilities District in placing the natural gas pipe line in Twenty-seventh street and Q street. It thus affirmatively appears that the Metropolitan Utilities District has acquired title to property of the value of $50,000, subject only to a use of six years, without the expenditure of public funds, and without in any manner entailing upon it or the city of Omaha any burden of future expenditures. So far as the transaction affecting injuriously the business of the Utilities District or the proprietary rights of the city of Omaha, the contrary appears from uncontradicted evidence.

Even assuming, for the purpose of this discussion only, that the corporate acts questioned in this litigation are wholly illegal and invalid, still it is patent that they have occasioned no expenditure of public funds; that they will require no outlays by the public corporations involved; and neither will they necessitate or involve any future increase in the burden of municipal taxation.

As to the placing of the natural gas main in the streets of Omaha in the manner disclosed by this record, it will be remembered that "Not every invasion of, or structure

upon, a public highway is unlawful, but that they may legally exist, the authority therefor must have its ultimate source in the legislature of the state in whose jurisdiction the highway exists." *World Realty Co. v. City of Omaha*, 113 Neb. 396.

"One who seeks the extraordinary remedy of injunction must establish by competent evidence every controverted fact necessary to entitle the party to the relief to be granted." *World Realty Co. v. City of Omaha, supra.*

"A private person * * * seeking the aid of equity to restrain a public nuisance must show some special injury peculiar to such person * * * aside from and independent of the general injury to the public." *World Realty Co. v. City of Omaha, supra.*

It is obvious the requirement that plaintiff, when a private person seeking an injunction against a public nuisance, "must show some special injury peculiar to" himself is a prerequisite to any injunctive relief. The only material evidence in the instant case relating to this proposition is a stipulation made by the parties at the trial, to the effect that appellant was and is a resident and taxpayer of Omaha, Nebraska. This court is committed to the view that this was, and is, insufficient. The case of *Ray v. Colby & Tenney*, 5 Neb. (Unof.) 151, it appears, was a proceeding to enjoin Colby and Tenney from proceeding to erect, construct, equip, maintain and operate gas works in the city of North Platte for the purpose of making, supplying and selling gas for fuel and for lighting purposes. One Lloyd, intervening therein, alleged in his petition that he was a resident taxpayer, and in addition properly pleaded ultimate facts which, if true, disclosed that the sole ordinance under which the defendants were proceeding with the work sought to be enjoined was wholly void and never in legal force and effect in the city of North Platte. The issue involved in this North Platte case, as in the instant case, under the assumption we here indulge for the purpose of discussion, was whether a resident taxpayer as such, in his private

capacity, was competent and empowered by legal proceedings to enjoin the unlawful laying of gas pipes on the public streets. In the opinion in the case just cited we find the following: "The first question presented is, Does the petition of Lloyd state a cause of action which he is entitled to maintain? His allegations of interest in this controversy are citizenship and being a taxpayer. He does not show by his pleading wherein either of these interests are or may be injured by the acts complained of; therefore we must conclude that his petition is insufficient." In the syllabus the rule is stated: "A private individual cannot maintain an action to prevent gas mains being laid in the streets of a city unless he plead and prove that some special injury will result to him." The rule thus stated has been approved in principle in the following cases: *Kittle v. Fremont,* 1 Neb. 329; *Shed v. Hawthorne,* 3 Neb. 179; *Hill v. Pierson,* 45 Neb. 503; *George v. Peckham,* 73 Neb. 794; *Lee v. City of McCook,* 82 Neb. 26; *Gleason v. Loose-Wiles Cracker & Candy Co.,* 88 Neb. 83; *Powers v. Flansburg,* 90 Neb. 467; *Brown v. Easterday,* 110 Neb. 729. All the decisions cited, in substance, recognize the established principle in this jurisdiction, viz.: "It is essential to the right of an individual to relief by injunction against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which the general public shares, and the difference between the injury to him and the public must be one of kind, and not merely of degree." *Ayers v. Citizens R. Co.,* 83 Neb. 26. See, also, *Woods v. Lincoln Traction Co.,* 83 Neb. 23.

The case of *Tukey v. City of Omaha,* 54 Neb. 370, cited by plaintiff, is not in point. That case involved the issuance of an injunction where it was charged and established that "an illegal disposition of the public money, or the illegal creation of a debt which must be paid by taxation," was threatened and would occur if not enjoined. The evidence in the instant case affirmatively negatives both of the conditions quoted.

This reasoning is expressly recognized and approved in *Clark v. Interstate Independent Telephone Co.*, 72 Neb. 883, also cited by plaintiff, where the doctrine is announced, in effect, that a taxpayer, under the facts involved in that case, in the absence of an injury peculiar to himself, cannot maintain a suit for an injunction against a municipality unless the results of the action attacked in such proceeding will cause such "a wrongful squandering or surrendering of the money or property of the city that taxation will be increased thereby."

The conclusion follows that, under the facts alleged in the petition of plaintiff, and established by the evidence in the instant case, he has failed to establish that any special injury has or will result to him from the matter sought to be enjoined. Neither does it appear that any wrongful squandering of the money of the city has occurred, nor that taxation will in any measure be increased thereby.

Plaintiff is therefore not entitled to maintain this action for injunctive relief, and on this ground the district court properly dismissed the action. In this situation, the basic pleading failing to state a cause of action in favor of plaintiff and being wholly without equity, the determination of other questions presented by the briefs and argued by counsel is wholly unnecessary to a proper disposition of this case and will not be further considered.

It follows that the judgment of the trial court dismissing plaintiff's action and denying him injunctive relief is correct, and is

AFFIRMED.

OLIVER CHAPMAN, APPELLANT, V. CARRIE P. PERSON ET AL., APPELLEES.

FILED MARCH 9, 1934. No. 28859.

Appeal. Motion to quash bill of exceptions having been sustained, judgment affirmed on the authority of *Lincoln Land Co. v. Commonwealth Oil Co.*, 109 Neb. 652.

APPEAL from the district court for Wayne county: CHARLES H. STEWART, JUDGE. *Affirmed.*

Fred S. Berry and *McDonald & Edens,* for appellant.

Russell W. Bartels, guardian *ad litem, H. E. Siman* and *J. E. Brittain, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

PER CURIAM.

This was an action for foreclosure of a certain real estate mortgage brought by the plaintiff Oliver Chapman against Carrie P. Person and Per Person. Russell W. Bartels was duly appointed guardian *ad litem* for Carrie P. Person, as an insane defendant, and also appears in this cause on appeal as an appellee. There was a judgment in the district court denying relief and dismissing plaintiff's action, and he appeals.

Preliminary to the determination of the merits of the controversy, there was presented a motion to quash the bill of exceptions.

The record in this case discloses that the final judgment appealed from was entered February 17, 1933, a regular day of the November, 1932, term of the district court for Wayne county which adjourned *sine die* on May 1, 1933. The transcript on appeal was filed May 12, 1933. Appellant's brief was filed June 7, 1933. Appellees' briefs were filed July 24 and August 25, 1933. No order was entered in this cause extending the time for settling or allowing the bill of exceptions.

On November 25, 1933, notice was served by the guardian *ad litem* upon appellant of motion to dismiss the appeal because no bill of exceptions had been filed in the cause. On November 28, 1933, a bill of exceptions, settled and allowed by the trial judge on September 18, 1933, was filed in this court. Thereafter the motion to dismiss the appeal because of the absence of the bill of exceptions was by this court denied. On January 26, 1934, a motion

to quash the bill of exceptions was filed. It will be noted that 140 days elapsed between the date of the final adjournment of the term at which the judgment appealed from was entered and the date of the settlement and allowance of the bill of exceptions by the trial judge. This motion we were compelled to sustain.

The language of Rose, J., in *Lincoln Land Co. v. Commonwealth Oil Co.*, 109 Neb. 652, is applicable to the facts above outlined, states the controlling principles governing the disposition of the present case, and is as follows: "A motion to quash the bill of exceptions was submitted with the case on its merits, and is sustained for the reason that it was signed by the trial judge after the statutory period for allowing it had expired. The judgment from which defendant appealed was rendered and entered on the journal April 13, 1921, at the February term which expired June 3, 1921. The bill of exceptions was signed by the trial judge December 26, 1921. That was too late. He had no authority to settle it more than 100 days after the expiration of the term. *Walker v. Burtless*, 82 Neb. 211. It is argued, however, that the motion should not be sustained because the briefs of defendant were filed before plaintiff objected to the bill of exceptions. This position is untenable. The bill of exceptions did not reach the appellate court until after defendant's briefs were filed (*Stock v. Luebben*, 72 Neb. 254). With the bill of exceptions quashed in the appellate court, it will be presumed that the evidence sustains the findings of fact below on the material issues. The inquiry on appeal is thus narrowed to the sufficiency of the pleadings to support the judgment," which are in no manner questioned by the appellant in the instant case.

It follows that the motion to quash the bill of exceptions having been sustained, the judgment of the district court is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. STATE BANK OF OMAHA, E. H. LUIKART, RECEIVER, APPELLANT: CORA WOLF, INTERVENER, APPELLEE.

FILED MARCH 9, 1934. No. 28803.

1. **Appeal.** In a suit in equity, credence given by the trial court to a witness whose testimony is contradicted by another witness may be considered on a trial *de novo* in the appellate court.
2. **Banks and Banking: PLEDGES.** In equity, a guaranty and a pledge of collateral securing it may be canceled for fraud in the procuring of those instruments, and in that event the collateral may be restored to pledgor as trust property in the hands of the receiver of the pledgee after insolvency.
3. **Pledges: FRAUD.** Fraud in procuring a guaranty and a pledge of collateral securing it may be proved by evidence that obligor was induced to sign those instruments by false statements of obligee that he had other collateral of equal value which would be exhausted first, that obligor believed and relied on the false statements and except for them would not have entered into the obligations.
4. **Harmless errors** in rulings on evidence do not require a reversal on appeal.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

F. C. Radke, Barlow Nye and *O'Sullivan & Southard,* for appellant.

G. F. Nye and *Leon & White, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

ROSE, J.

This is a proceeding in equity to cancel a guaranty alleged to have been procured by the State Bank of Omaha from Cora Wolf by fraud, to repossess securities pledged by her as collateral for her obligation as guarantor and to require pledgee to account for the income from, or proceeds of, the collateral pledged. The guaranty bore

the signature of Jake Spiesberger, Cora Wolf and E. Treller.

In an action to wind up the affairs of the State Bank of Omaha, an insolvent corporation in the hands of E. H. Luikart, receiver, Cora Wolf, intervener, pleaded that, through fraud, she was induced to sign a 50,000-dollar guaranty for payment of past and future debts, however evidenced, owing by M. Spiesberger & Son Company, hereinafter called the "company," to the State Bank of Omaha, hereinafter called the "bank;" that intervener pledged, and the bank received as collateral, notes, mortgages and bonds aggregating in amount and value $25,000; that, to induce intervener to sign the guaranty and make the pledge, the bank, by its president, falsely stated to intervener that the company had pledged collateral of the value of $25,000 to secure debts owing by the former to the latter; that the collateral so pledged by the company would first be applied to the extinguishment of its obligations to pledgee and that the securities pledged by intervener would only be used in the event the securities pledged by the company would prove to be insufficient; that such statements were false, and intervener believed them and relied on them and was thus induced to sign the warranty and make the pledge; that, as a further inducement, the president of the bank promised to deliver to her the income from the collateral pledged by her; that the company filed a petition in bankruptcy and listed the bank as a creditor in the sum of $34,400, a claim for which was filed in the bankruptcy court January 13, 1931; that the department of trade and commerce took charge of the bank August 10, 1931, and the receiver thereafter threatened to sell intervener's pledged collateral and to apply the proceeds in payment of the bankrupt's indebtedness to the bank; that intervener made a futile demand for the return of her pledged securities.

The receiver denied the fraud charged by intervener and pleaded that her guaranty and pledge were in full

force and effect; that, when the receiver took charge of the bank, the debt owing to it by the company, payment of which had been guaranteed by intervener, was $34,400; that upon payment thereof the receiver would surrender the collateral in his possession and account for money already realized from pledged securities. The receiver prayed for an accounting to determine the amount due on intervener's guaranty, for judgment therefor, and for authority to sell the collateral and apply the proceeds on the judgment, if not paid when directed by the court.

A reply put in issue the facts on which the receiver based his prayer for relief.

Upon a trial of the cause the district court found all the issues in favor of Cora Wolf, intervener; canceled the guaranty for fraud; ordered the receiver to return to intervener her securities in his hands; directed payment of proceeds of her collateral in the sum of $18,960 to her as a trust fund in the receiver's hands. The receiver appealed.

The finding that intervener was induced by fraud of the bank to sign the guaranty and to make the pledge is vigorously assailed as erroneous. The principal witnesses who testified on this issue were Cora Wolf, intervener, and Albert L. Schantz, president of the bank. Their testimony is in direct conflict on the crucial point. Who told the truth? The district judge who believed intervener saw and heard the witnesses. The appellate court is deprived of that advantage and, on a trial *de novo*, may consider the fact that the court below gave credence to the witness Cora Wolf rather than to the witness Schantz, their testimony being in conflict. *Broeker v. Day*, 124 Neb. 316; *Maryland Casualty Co. v. Geary*, 123 Neb. 851.

The company was a corporation which had been engaged in the wholesale millinery business in Omaha for 30 years. Jake Spiesberger, a brother of Cora Wolf, was an executive officer and manager of the company. Other Spiesbergers were also interested in it. The company

wanted credit and Jake arranged with Schantz, president and manager of the bank, for loans, when needed, to the extent of $50,000. The bank was closed on account of insolvency August 10, 1931, when its unpaid loans to the company were $34,400. The company went into bankruptcy December 4, 1931. Intervener signed the guaranty for $50,000 February 8, 1926, and pledged as collateral $25,000 in bonds secured by mortgages on real estate. She testified she had a conversation on that date with Schantz in his office in the bank and that they were the only persons present. Referring to what then and there occurred before she signed the guaranty she said:

"I went down to the bank and went into the little room and talked with Mr. Schantz and he had these papers for me to sign, and I asked him how I was going to be protected. He told me that he had $25,000 in securities from Spiesbergers; he had them, and that they would be used first in case it would be needed before they would take mine."

Uncontradicted evidence proved that the bank did not then have or thereafter acquire from the company $25,000 in collateral. Cora Wolf's testimony tends to prove the following facts: Schantz was president and head of the bank. She believed his statements were true and relied on them. She would not have signed the guaranty except for his statements. She had not owned any stock in the company for 20 years; never signed any notes payable to it; never was at the bank at any other time. Her securities were there when she arrived. Jake had told her the company had deposited $25,000 in securities and for her to go to the bank and sign the papers. Her pledged securities were all the property she had except her residence. She lived on the income from the bonds pledged, having received the interest thereon indirectly from the bank through the company after she signed the guaranty. Two weeks after the bank closed she first learned that the company had not deposited $25,000 in securities.

Schantz was a witness for the receiver of the bank and told a different story. He said Jake prepared and signed the guaranty before Cora Wolf came to the bank, where the papers had been left. Her part in the transaction was narrated by Schantz as follows:

"Mrs. Wolf came to my desk, and said that she had come into the bank to sign the papers that Jake, her brother, had sent her up there to sign, and I took her in my private office and gave her the assignments on the mortgages and the guaranty which she signed. There was no other conversation."

On the witness-stand Schantz denied he made the statements to which intervener testified. He said in substance that he did not tell intervener the bank had received collateral from the company or its officers and denied that he told her the company's collateral would be exhausted before resorting to her pledged securities; that she voluntarily signed the guaranty and the assignments of her pledged paper. If credence is given to his testimony it proves that the guaranty was not procured by fraud.

Some of the circumstances surrounding the transactions seem to strengthen intervener's testimony. Willard L. Idell, an officer of the bank when the guaranty was signed, testified that as a rule collateral for credit was required in approximately the amount of loans. Had this rule been followed, the bank would have exacted $50,000 in collateral. On the date of the guaranty, February 8, 1926, Jake Spiesberger and Mayer Spiesberger, stockholders of the company, in consideration of loans, assigned to the bank any claim either might have or acquire against the company, and this assignment, without indicating any value, was accepted by the bank as collateral security. December 27, 1927, Jake Spiesberger assigned, and the bank accepted as collateral, a claim without any indication of amount or value and a 5,000-dollar note. The evidence does not show that this collateral was of any value.

An effort was made to impeach intervener's testimony

to the effect that she pledged to the bank as collateral all her property except her residence, but there is nothing to show that she retained for herself any property of any kind from which she derived an income. In this situation, before the signing of the guaranty, it would not be unreasonable to infer that she would be prompted to engage Schantz in conversation and to ask him how she was to be protected in trusting to the bank her means of support. If he followed the rules of the bank, it would have had, or would acquire, $25,000 in collateral in addition to her own. In this situation it would not be unreasonable for the banker to say to a guarantor without legal knowledge that collateral of the principal debtor would be first exhausted.

It seems clear that intervener did not part temporarily with all her interests in the pledged securities, since she continued to receive the interest thereon through the bank and the company.

In view of all the testimony, of the surrounding circumstances and of the credence which the trial judge gave to intervener as a witness after having seen and heard her and other witnesses as they testified, the conclusion is that the guaranty was procured by fraud as charged in the petition, that it was properly canceled, and that securities and proceeds belonging to intervener in the hands of the receiver were restorable to her in equity as trust property.

Though the cause was tried before the district court without a jury, each of 40 assignments of error is directed to a ruling on evidence. They do not require separate rulings or reasons. Most of them apply to the sustaining of objections to questions propounded to witnesses. Many of the questions called for collateral facts within the discretion of the trial court to reject as evidence. Others were objectionable as argumentative. The answers to many more would not have thrown any light on any controverted issue. Some were immaterial. As to the re-

mainder of the questions, the facts which the receiver offered to prove, if admitted, would not have required a different result on the merits of the controversy. Prejudicial error in the rulings on evidence has not been pointed out or found. In view of the conclusions reached, the judgment of the district court is

AFFIRMED.

FELIPA HERRERA CRESPIN, APPELLANT, V. NEWELL R. WILCOX ET AL., APPELLEES.

FILED MARCH 9, 1934. No. 28817.

1. **Guardian and Ward.** The county court is a court of record and of original jurisdiction in matters relating to the appointing and directing of guardians.
2. ———. A county court's judgment appointing or directing a guardian is not open to collateral attack merely because it does not recite on its face the jurisdictional facts.
3. **Pleading.** General allegations of conspiracy and of resulting damage are insufficient to state a cause of action, if they are negatived by other allegations in the same petition and by the law applicable thereto.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

Thomas Ryan and *Grenville P. North*, for appellant.

Lee & Bremers and *Crofoot, Fraser, Connolly & Stryker, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ.

ROSE, J.

The sufficiency of the petition to state a cause of action is the question presented by the record in this case.

Plaintiff, Felipa Herrera Crespin, sued George W. Pratt, Newell R. Wilcox, J. G. Bushnell and Standard Accident

Insurance Company for a conspiracy to defraud her, for an accounting in equity to determine how much each conspirator owes her, for a recovery of damages resulting from the conspiracy, for equitable relief from abuses of confidential relations between attorney and client and between guardian and ward, and for recovery of title to undescribed real estate purchased in the names of the conspirators with money belonging to plaintiff.

General demurrers to the petition were sustained. Plaintiff stood upon her petition and the action was dismissed. Plaintiff appealed.

It may be inferred from the petition that Pratt was attorney for plaintiff when the alleged conspiracy was formed; that the county court of Douglas county appointed Wilcox guardian of plaintiff's property; that the insurance company bonded Wilcox as guardian. The record does not show that Bushnell was summoned or that he entered his appearance.

Plaintiff alleged in her petition that, prior to March 20, 1929, the government of the United States gave her, as widow of a soldier of the World War, a check for $7,200; that she indorsed the check to the Sisters of the Good Shepherd; that, to procure her money from them, Pratt was employed as her attorney and collected from them for her approximately $7,200; that on March 20, 1929, he prepared and filed with the county court of Douglas county the following application which plaintiff signed and verified:

"Comes now Felipa Herrera Crespin, and shows to the court: That she has recently come into possession of a quantity of money; that she is not accustomed to the handling of money, and knows very little of the value of the same; that she desires to have the protection of the court in the handling of her funds, and believes that a guardian appointed for the purpose of looking after her money or property, of whatever nature it may be, would be of great assistance to her, and for these reasons, she

prays the court for an order, appointing Newell R. Wilcox as the guardian of her property, said applicant consenting that said appointment be made immediately, and for such other and further order as to the court may seem just and equitable."

It was further alleged in general terms by plaintiff that the county court, without jurisdiction, entered void orders respecting her property; that money of plaintiff in the sum of $7,200 was turned over to defendants; that no valid order for disbursement thereof has ever been made; that plaintiff does not know where all her funds have gone or how much each defendant received; that a portion of her money has been invested in real estate in the name of Pratt and other portions have been invested in real estate in the names of the other defendants.

It may be inferred from general language of the petition that the acts and judicial orders through which the money of plaintiff passed out of her hands into the hands of defendants were results of the alleged conspiracy. The substance of the conspiracy is that defendants agreed among themselves to procure plaintiff's money for their own use without consideration.

The petition as a whole seems to be fatally defective. The county court is a court of record and of original jurisdiction in matters relating to the appointing and directing of guardians. In the exercise of power to appoint a guardian the county court's judgment is not open to collateral attack merely because it does not recite on its face the jurisdictional facts. The same is true of orders directing distribution of a ward's property. The petition shows further that the county court made orders respecting the identical property which plaintiff now seeks to recover. What those orders were is not stated. The legitimate inference is they were made for her benefit. For anything shown by the petition, those orders may have directed payment of her own money to her or for her own support pursuant to her own applications and

she may be asking now for money which she has received pursuant to a valid order of the county court. The real estate which she seeks to recover may be security for her own money, pursuant to a valid order of the county court. The law presumes the validity of such orders in absence of specific facts showing the contrary. The petition herein shows on its face that plaintiff signed and verified the application for the appointment of Wilcox as guardian of her property. She, herself, thus invoked the power which the county court exercised. There is no fact stated which shows that she made a mistake or that she was incompetent to so act, or that her attorney misled her, or acted in bad faith, or deceived her in respect to her application for a guardian for her property. In view of facts which she herself pleaded herein, her general allegation that her attorney acted pursuant to a conspiracy is a mere conclusion. The petition not only fails to show fraud in the making of the application for a guardian or in judicial orders respecting her property, but it fails to show that whatever was done in the county court was not done at her own request for her own best interest. The petition does not show any specific fact which will prevent her from obtaining full redress in the county court, if she has been wronged there by the exercise of judicial power which she herself invoked without fraud, duress or abuse of trust on the part of any fiduciary acting for her. Moreover, she has not stated any fact showing that she is not fully protected by the bond of the guardian. The general allegations of conspiracy and of resulting damage are negatived by other allegations of facts and the law applicable thereto. For the reasons stated, the conclusion is that the demurrers were properly sustained.

AFFIRMED.

AUGUST MUSSMAN, ADMINISTRATOR, APPELLANT, V. ISAAC C. STEELE, APPELLEE.

FILED MARCH 9, 1934. No. 28825.

1. **Trial.** The trial of issues of fact in a law action is for the jury.
2. ———: DIRECTION OF VERDICT. It is error to direct a verdict for defendant where there is any substantial evidence that would tend to support a verdict for plaintiff.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Waring & Waring, for appellant.

Sloans, Keenan & Corbitt, contra.

Heard before ROSE, GOOD, EBERLY and PAINE, JJ., and MEYER, District Judge.

GOOD, J.

August Mussman, as administrator of the estate of his deceased wife, sued to recover damages resulting from her death, which he charges was proximately caused by the negligence and wrongful acts of the defendant. Defendant denied any negligence, and alleged that Mrs. Mussman's death resulted from other causes. At the conclusion of the evidence, the trial court, on motion of defendant, directed a verdict in his favor. Plaintiff has appealed.

The record discloses that Mr. and Mrs. Mussman resided in Fillmore county. July 8, 1932, at her home, Mrs. Mussman accidentally cut the small finger of her left hand. Two days later she became ill, and it appears that she was suffering from septicæmia, or blood poisoning, and continued to grow worse until the 17th of July, when the attending and consulting physicians advised that she be taken to a hospital in Lincoln where she could have better care. The plaintiff arranged with defendant, the owner of an ambulance, to take his wife to a hospital in Lincoln. Defendant went to plaintiff's home, where Mrs. Mussman

was placed on a cot in the ambulance, and the journey to Lincoln started. Plaintiff accompanied his wife in the ambulance. After they had gone six or seven miles, a heavy rain came on, and the roads became muddy and slippery. In going down a long hill, defendant, driving the ambulance, lost control thereof, ran into a ditch on the left side of the road, and the ambulance turned over on its side. Mrs. Mussman received injuries, consisting of two cuts on the left arm and some bruises. She remained in the overturned ambulance, or at the scene of the accident, for an hour or more, until another ambulance could be obtained, in which she was taken to the Lincoln General Hospital, where she died two days later.

Plaintiff testified that he smelled liquor on the breath of the driver of the ambulance at the scene of the accident; that prior to the accident he had been driving at an excessive rate of speed; that plaintiff had protested several times at the rate of speed; that in going down the hill defendant was driving at the rate of 50 miles an hour at the time of the accident; that Mrs. Mussman became wet from the rain at the scene of the accident. The evidence shows without question that she died of pneumonia. There is testimony by a specialist, who did not see Mrs. Mussman at any time, but who testified from data supplied by the hospital record and testimony of physicians who had been attending Mrs. Mussman, which was all in the evidence, that, in his opinion, she did not have pneumonia at the time she started on her journey to the hospital; that the exposure at the time of the accident, especially in her physical condition and lowered resistance, caused the onset of pneumonia, and that it developed within a day after the accident; that, but for the exposure at the scene of the accident, she might not have contracted pneumonia, and that, in his opinion, the cause of the pneumonia was due to exposure at the time of the accident.

In passing, it may be said that there is a sharp conflict in the evidence as to the rate of speed at which

defendant was driving at the time of the accident, and that the evidence on behalf of defendant presents quite a different aspect. However, we are not to pass upon the question of evidence, except to determine whether there was any substantial evidence, tending to sustain plaintiff's cause of action. We think the jury, if they had believed the testimony of plaintiff, would have been justified in finding that defendant was guilty of negligence in driving down a hill over muddy, slippery roads, at a high rate of speed, and that his negligence was the cause of the ambulance overturning; and, if they believed the testimony of the specialist, called by plaintiff, they would have been justified in finding that the exposure of Mrs. Mussman at the scene of the accident was the inducing cause of the onset of pneumonia which caused her death. There is more than a scintilla of evidence tending to support the plaintiff's cause of action. The jury, not the court, are the triers of fact in law actions. The rule is well established that the court is justified in directing a verdict for defendant only where there is no substantial evidence to support a verdict for plaintiff. Even though the evidence of plaintiff is slight and, to the court, apparently greatly outweighed by the evidence for defendant, nevertheless it is for the jury, and not the court, to weigh the evidence and determine the question of fact.

Defendant contends that Mrs. Mussman would have died from septicæmia, or blood poisoning, even if the accident had not occurred, and that the accident had nothing to do with causing her death. It is possible that Mrs. Mussman might have died, had there been no accident; but, if her death was hastened by the negligence of defendant, plaintiff would still be entitled to some recovery. We think there was sufficient evidence to require submission of the cause to the jury, and the court erred in directing a verdict for defendant.

Other errors discussed in the brief are not likely to arise upon another trial and will not be considered.

For the error in directing a verdict for defendant, the judgment is reversed, and the cause remanded for further proceedings.

REVERSED.

HOWELLS STATE BANK, APPELLEE, V. JOHN B. HARDES, APPELLANT.

FILED MARCH 9, 1934. No. 28834.

Judicial Sales: VACATION. "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *First Nat. Bank v. Hunt*, 101 Neb. 743.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

Dolezal, Mapes & Johnson, for appellant.

George W. Wertz and *Courtright, Sidner, Lee & Gunderson, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

GOOD, J.

This is an appeal from an order confirming a judicial sale, had in an action for foreclosure of a real estate mortgage. The objections to confirmation were that the mortgaged premises did not sell for a fair and reasonable price, and that, if again offered for sale, would bring an increased price. The mortgaged premises consisted of 80 acres and sold for $7,040.

We have carefully examined all of the affidavits filed, and find that nearly all of them bear date a year prior to the date of the sale. There are subsequent affidavits by several of the same persons showing that the sale price of land has decreased very greatly. From a con-

sideration of all the affidavits, we are unable to say that the sale price was so inadequate as to indicate fraud or mistake.

In *First Nat. Bank v. Hunt*, 101 Neb. 743, this court held: "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." The rule thus announced was reaffirmed in *Royal Highlanders v. Louthan*, 123 Neb. 469. The rule announced in those cases governs the decision in this case.

The record discloses no error. The judgment of the district court will be affirmed, with leave to defendant to redeem at any time prior to the issuance of mandate.

AFFIRMED.

RACHEL P. DILLON, APPELLEE, V. SEARS-ROEBUCK COMPANY ET AL., APPELLANTS.

FILED MARCH 9, 1934. No. 28583.

1. **Witnesses.** Admission made by party inconsistent with testimoney goes merely to credibility as witness.
2. **False Imprisonment:** QUESTION FOR JURY. Where evidence is sufficient to support verdict for damages for false imprisonment, whether defendant's acts amounted to false imprisonment question of fact for jury.
3. ———. Restraint of person is essential to constitute false imprisonment. Such restraint may be by threats as well as by force, if the words and conduct are such as to induce reasonable apprehension of fear of injury to person, reputation, or property.
4. ———: PRINCIPAL AND AGENT. Principal liable for acts of agents who act within scope of authority in an action for false imprisonment.
5. ———: ———. District manager and manager of local store in charge of property and business of corporation act within scope of authority when they investigate or permit investigation of employees as to fidelity and honesty.

6. ———: ———. One who aids or assists in unlawful imprisonment of another is liable as principal.
7. ———. Where corporation contracts with another for purpose of investigating employees and its authorized agents cooperate with and assist employee of contractor in an illegal restraint of person, the corporation is liable.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed on condition.*

Ziegler & Dunn, for appellants.

Brome, Thomas & McGuire and *G. H. Seig, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

DAY, J.

Rachel P. Dillon brought this action to recover damages against Sears-Roebuck Company, Fred Arndt, district manager, and Roy Sellers, manager of the Omaha store for the company. From a judgment of $3,000, the defendants appeal. This case was previously heard by this court, an opinion adopted, and a judgment of reversal entered, 125 Neb. 269. Upon an oral argument upon the motion for rehearing, the court has reached a different conclusion.

The plaintiff was employed in an inferior capacity in the Omaha store of Sears-Roebuck Company. This controversy had its inception when one Behr, a private detective, an employee of the Willmark Service System, began a check of the Omaha store under a contract between Sears-Roebuck Company and the Willmark System. A woman detective, assistant to Behr, purchased a paint brush from plaintiff, who then was a saleslady in the paint department, for $1.15. In a few minutes, she took it back and exchanged it for one costing $1.10 additional. It was and is the claim of defendants that plaintiff handled this transaction in an irregular manner. Behr directed some employee of Sears-Roebuck, he says Sellers, manager of the local store, and she says the manager of the paint

department, to send her to him for an interview about this transaction. In any event, she was soon closeted with Behr in an office upon the fourth floor of the store. The testimony as to what happened there is largely in conflict. However, this is a law case, not triable *de novo* in this court, and the sole question for determination is the sufficiency of the evidence to support a verdict. *Eggleston v. Quinn,* 88 Neb. 775.

Plaintiff testified that the paint brush transaction was discussed immediately; that she told him what she still claims were the facts; that she made out a ticket in the exchange book and required the purchaser to sign it and laid it upon the cash register with the money. She had to get an "O. K." from the manager and take it to the cashier on the next floor; that a number of customers requiring attention delayed her, and that when she returned, the money and slip were gone. She told Behr that she would make it good. He then stated that she would have to sign a statement to that effect. He prepared a statement which she signed and it is as follows:

"I, Mrs. Rachel Dillon, age 18, married, residing at 2631 Capitol Ave., Omaha, Nebraska, have been in your employ since about Feb. 1, 1930.

"On July 15, 1930, I sold to a customer one paint brush for $1.15, and the customer later exchanged this brush for one selling for $2.25. The customer gave me the difference of $1.10, and I did not record this amount but kept it for my personal use.

"This statement was typewritten at my request by Mr. Fred M. Behr, and I have read it over thoroughly and know it to contain nothing but the truth. I am signing this on my own free will, without threat or promise from any one present, and I have been spoken to in a gentlemanly and courteous manner." (Italics ours.)

Taking the inference most unfavorable to the plaintiff, this was evidence of an admission against her positive sworn testimony that she did not steal the money but that it was lost as she stated. The jury could with propriety

determine that she was careless and negligent rather than that she was a thief. We will discuss this statement later in connection with a second one signed at the same interview.

However, this detective who wrote this statement at plaintiff's request, a thing almost incredible, admits that the last paragraph was in his words and his idea and not suggested by her. It seems that the jury might conclude also that the statement that she kept the money for her own use was also his idea and in his words. Would any one be so credulous as to believe in view of all that transpired that afternoon that Behr would have been satisfied with or accepted anything different?

However, in connection with this transaction, it is interesting to note that the executives of the defendant company were as vague in their notion as to the manner in which such an exchange should be handled by a saleslady as plaintiff. Arndt, who was district manager in charge of five retail stores for Sears-Roebuck Company, testified upon the second trial of this case, a long time after this controversy, when this had been engaging his attention, the method by which an exchange of this kind should be handled. Sellers, the local manager of the store, testified that the transaction should be handled in an entirely different manner, and, as a part of his examination, he made a sample record on their forms showing the correct method. Shinstock, the assistant manager for the defendant, criticized the model, offered in the record as exhibit 5, as having two important omissions. Yet these defendants were, and in this lawsuit are, holding this 18-year-old girl, who was occupying an inferior position, to a strict knowledge of and a strict accountability to the rules concerning which the highest executives of the defendant company had different ideas. In fact, Arndt later took the stand and stated that he was mistaken as to the requirements of the rules. Under such circumstances, the contention of the plaintiff that her action was a mere irregularity and she was negligent in losing the

money is as justifiable a conclusion as that of the private detective that she was a thief, and this conclusion is reached without any consideration of motives or interests on the part of this detective to find some clerk stealing from the store. "An admission made by a party which is inconsistent with his testimony goes merely to the credibility of the witness." 3 Jones, Evidence (2d ed.) 1973.

The discussion of the paint brush episode required about five minutes. Behr then questioned her about stealing other money. Plaintiff testified that he told her that they had a "whole bin full of merchandise" in the shipping department for which she had kept the money, which was untrue. She also testified that he called Mr. Sellers to the office, and that after a conversation he told Behr that the amount of money which plaintiff had taken on account of this merchandise was $850. This was denied by Sellers and by Behr. Behr testified that she stated she had been taking money in this same way during the time of her employment, which was six months, and that she told him she thought it would average about $5 a day; that he figured six months, 27 days to the month, and $5 a day, by which he arrived at the figure of $850. This indicates that Behr's arithmetic was as bad as his detective work, because, figured on that basis, it would only amount to $810. Furthermore, the defendants introduced as exhibit 8 a report of sales for March, April, May, and June, 1930, four of the six months the plaintiff was employed, and this exhibit establishes the fact that March, April, and May had 26 days each, while June had 25 business days. February, another month of this period had only 24 business days in 1930. The evidence also establishes that for one month of the six months' period, the plaintiff was working on the elevator and handled no money, and for the rest of the time, except for the last two weeks when she worked in the paint department, that her average sales were only $14 or $15 a day. The defendant offered testimony showing the department sales to be much larger, but she was not the only saleslady in the

department, and they made no effort to introduce evidence as to the plaintiff's sales, which were undoubtedly shown by their records. The only conclusion that can be reached from this testimony, relating to whether or not the plaintiff had stolen the $850 mentioned in the second statement, is that there is no foundation in fact for the statement. At the time, Behr did not know that Sears-Roebuck Company had lost $850. Sellers, manager of the local store, said that he knew of no such shortage and such a shortage could not exist without his knowledge. He also testified that they had taken an inventory July 1, 14 days earlier, and that, with their system of running inventory, they could check in 12 hours and determine whether the inventory, compared to the sales, would indicate a loss. But, under these circumstances, Behr is determined to get a statement from the plaintiff that she had stolen $850. The statement has a striking similarity to the first except as to amounts and follows:

"I, Mrs. Rachel Dillon, age 18, married, residing at 2631 Capitol Ave., Omaha, Nebraska, have been in your employ since about Feb. 1, 1930.

"During the last five and one-half months, I have taken money from sales that I made but did not record, to the amount of Eight Hundred and Fifty Dollars ($850). This money I used for my own personal use, and I realize I have broken a store rule, by handling these sales in this manner.

"This statement was typewritten at my request by Mr. Fred M. Behr, and I have read it over and know it to contain nothing but the truth. I am signing this statement on my own free will, without threat or promise from any one present, and I have been spoken to in a gentlemanly and courteous manner."

The italics in this statement are ours and call attention to the fact that it was prepared by one experienced and accustomed to this sort of thing. The plaintiff testified that she protested that she had not stolen this money but that he insisted that he had the proof; that she asked that

she be permitted to call her husband by telephone and reached for the phone, but that "he pushed it away from me and he kept insisting that if I didn't sign this, they would send me to jail." She was in this room on the fourth floor alone with Behr, and the door was shut. She was crying and hysterical. She did not try to leave, because he said that, if she tried to leave, they would send her to jail. She was in this office with Behr, according to her testimony, 45 minutes. Behr says that it was about an hour and 40 minutes and that practically all of the time was spent upon this $850 transaction. Sellers testified that it was his opinion that he took her to Behr's office at 10 minutes to 1 and that she was there until 3 o'clock.

Again we want to direct our attention to the last paragraph of the second statement. A former judge of this court, Judge Howell, in *Folts v. Globe Life Ins. Co.*, 117 Neb. 723, used a quotation of Ben Jonson, which is so applicable here that we repeat it: "The dignity of truth is lost with much protesting." This whole transaction indicates third degree methods, particularly when there was no loss of $850. The manner and method used in this case was calculated to terrorize an 18-year-old girl in her situation. That it did terrorize and intimidate her and prevent her from leaving the office is supported by evidence of the fact that she was crying; that she wanted to call her husband to her side, and that she signed an untrue statement admitting that she had misappropriated her employer's money.

Behr testifies that plaintiff told him about her theft of $850 and requested him to write the statement concerning it. Apparently he would have it believed that it required one hour and 40 minutes for her to persuade him to perform this arduous task. The appellant places much emphasis upon the fact that plaintiff remained in the store a half hour after she was released by Behr to see defendants Arndt and Sellers, but it must be remembered that at this time the detective had accomplished

his purpose and had a signed statement that she had taken for her own use $850. When a half hour later she did see Arndt and Sellers, she was still crying. Under somewhat similar circumstances, other courts have held that the question whether the defendants' acts amounted to a false imprisonment was a question for the jury if the evidence was sufficient to support a verdict for the plaintiff. See *Fleisher v. Ensminger* (1922) 140 Md. 604; *Coolahan v. Marshall Field & Co.*, 159 Ill. App. 466; *Moore v. Thompson*, 92 Mich. 498; *Mali v. Lord*, 39 N. Y. 381.

Appellants Arndt and Sellers contend that they had nothing to do with this affair. Let us examine the record. Sellers took her to the fourth floor office and turned her over to Behr who told him to leave. There is a conflict of testimony, but plaintiff testifies that Sellers came up and talked with Behr during the time about the $850. Arndt was in an adjacent office some of the time. He procured a typewriter for Behr to write the so-called confessions. This was done within five minutes of the commencement of the affair. The statements disclose, as does the testimony, that both Arndt and Sellers were called in by Behr to sign as witnesses. Both read them before signing, but they did not protest or make any suggestions, although they did not know of any such loss. During the time this drama was being enacted, Behr was undoubtedly master of ceremonies, but Arndt and Sellers were appearing when and if Behr gave them their cue. Afterwards Arndt had plaintiff in his office and talked to her. She testified the conversation concerned her ability to pay Sears-Roebuck Company the $850. Arndt testified as follows: "She came into my office, and I asked her if she realized that she was in a pretty serious mess. She took a few moments and finally shook her head to indicate yes. I was rather curious to know how she spent the money. I asked her whether they were buying an automobile or radio or something of that order. She said, 'No.' I asked her whether she had any way of making good any of the amount, and she said, 'No,' and that was

the end of our conversation." Arndt then left his office, and plaintiff was in the hands of Sellers. Plaintiff testified that Sellers inquired whether they had an automobile or radio or property of that kind and how she expected to pay the $850. She did not make a statement to Sellers that she had taken the money because she needed it. When Mr. Sellers asked her if they had any property or any automobile or radio or things of that sort, he asked it in connection with whether they could pay Sears-Roebuck Company the $850.

Plaintiff's husband testified that, when his wife came home, he went to see Sellers. He met him on the first floor, and he took him upstairs to talk to him about it. "On the way up, he told me how well he liked my wife and that she was a nice girl. * * * He asked me how we were going to pay it back. I says, * * * 'We have nothing.' I says, 'I don't believe my wife is guilty of the things you have charged her with anyway.' Then he mentioned the $1.10 and asked if I believed that, and if I expected them to believe it. * * * Then he asked me if we had anything that could be used as security until I could raise the money, and I said, 'No.' He said, 'Well, you will have to get me $350 in cash by tomorrow afternoon, and a note for $500, or I will have to send your wife to jail.' I asked him how he expected me to get that, and he says, 'That is not my worry. You will have to get that your own way.' "

Sellers' version of his conversations with the plaintiff and her husband as it appears in the record is that he said, " 'Rachel, for goodness' sake, what did you do this for?' She just sat there and says, 'I don't know.' * * * I says, 'You go home and stop crying. Go home and come back tomorrow afternoon at 3 o'clock and we will talk this thing over;' " that he said nothing to her about a car or a radio; that he never saw her again until in court. He thinks he asked her if she had anything to pay it back with, and she said "No." And she said that Harold had been sick and that they had bills. That he had a con-

versation with her husband in which he asked if any of their relatives had any way to pay back the money and told him to come back tomorrow with his wife. That he did not make a statement that unless they pay $350 and sign a note for $500 he would send her to jail.

Because of the former opinion, which placed considerable credence in the statements signed by plaintiff, it has been necessary to state the evidence at some length. This court does not decide disputed questions of fact, and, upon appeal, the only question presented is the sufficiency of the evidence to support the verdict. In the determination of this issue, the evidence must be considered most favorably for plaintiff with every reasonable inference in her favor. *Wells v. Cochran,* 78 Neb. 612.

Is the evidence upon false imprisonment sufficient to support the verdict? The essential thing to constitute an imprisonment is restraint of the person, which may be by threats as well as by actual force, and if the words and conduct are such as to induce a reasonable apprehension or fear of force, of disaster, or disgrace, a person may be as effectually restrained and deprived of liberty as by prison walls.

"Any intentional conduct chargeable to defendant, that results in placing of a person in a position where he cannot exercise his will in going where he may lawfully go, may constitute false imprisonment." 25 C. J. 452. See *Whitman v. Railway Co.,* 85 Kan. 150. Where plaintiff is detained for a refusal to comply with a condition which defendant has no right to impose, defendant is liable. *Beaver v. Cohen,* 162 N. Y. Supp. 160.

"In ordinary practice, words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the party is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used." *Martin v. Houck,* 141 N. Car. 317.

"Apprehension or fear by which a person is restrained of his liberty may consist in his fear of some injury

either to his person, reputation or property." *Robinson & Co. v. Greene,* 148 Ala. 434.

The plaintiff's evidence, corroborated by even the witnesses for defendant, is sufficient, if believed by jury, as it was, to show restraint of plaintiff for an unlawful purpose by threats of arrest and being sent to jail with all that means to an 18-year-old girl. However, some physical force was present when she was prevented from calling her husband to come to her assistance. The fact that she signed an alleged confession which obviously could not be true demonstrates the fear and apprehension which had possession of her. The jury saw the parties and were able to determine the effect of the threats better than this court can from the cold record. The evidence was ample.

The appellants, in the second argument, relied upon the proposition that plaintiff was an employee and defendants had a right to interview her about the business during business hours, because she was compensated for her time. They cite *Weiler v. Herzfeld-Phillipson Co.,* 189 Wis. 554. This case is somewhat different in that the employee involved therein was interviewed by one directly over her, while the company in this case secured an expert. The court said: "There is further evidence that he threatened to call the patrol and send her to jail if she did not confess. We cannot express our entire approval of this conduct on the part of Mr. Carter. It savors too much of third degree methods. It was one of the means adopted by Carter to coerce a confession from the plaintiff. It amounted to intimidation, and tended to deprive the plaintiff of her own free will. That, however, bears only upon the value of her confession as evidence." An admission made under duress is of no probative value, is incompetent and inadmissible. This is mentioned for that we are urged that, since plaintiff admitted a theft, she was beyond the protection of the law.

Returning to the *Weiler* case, we decline to follow the rule that an employer has a right to hold an employee in

restraint for the purpose of questioning offensively upon an unwarranted suspicion. We believe that the error in that is this, that an employer is not entitled to restrain an employee under any circumstances. The employee may wish to terminate his employment. Surely an employee is not compelled to continue an employment for the purpose of submitting to third degree methods.

To announce a doctrine that employees may be compelled against their will to submit to indignities such as plaintiff in this case was subjected to, because she was an employee and was compensated for her time, would be equivalent to saying that an employer can compel one to continue the employment against his will. The same court has held that similar circumstances constitute false imprisonment of one not an employee. See *Cobb v. Simon*, 119 Wis. 597.

Was Sears-Roebuck Company liable for the acts of Behr, Arndt, and Sellers? Behr was not a direct employee of Sears-Roebuck Company, but he was there by virtue of a contract between the company and his employer. His acts were done within the scope of his authority. It is contended by the appellants that he was an employee of an independent contractor, and, in this connection, personal injury cases and cases coming under the workmen's compensation acts are cited. We do not think that these are applicable. Behr as a representative of Willmark System was placed in the Omaha store for the purpose of testing employees and finding irregularities and the interview with the plaintiff was within the scope of his authority. This is not to say that the employer directly approved of the manner, although Arndt and Sellers assisted him during this transaction at his request. This was sufficient, we think, in view of the fact that, in doing so, they were doing what their employer required them to do. Arndt and Sellers were employees of the defendant and in charge of the Omaha store as managers for Sears-Roebuck Company, and being on the property and in charge of it were acting in the scope of their authority

as agents of the defendant. See *McClure Ten Cent Co. v. Humphries,* 33 Ga. App. 523. In this case, it was also held that where a detective, not an employee of defendant but of others, stopped and ordered plaintiff to accompany her, which invitation was concurred in by an employee of the defendant, the defendant was liable. It was held that whether the detective was acting in the interests of the defendant or of some other mercantile establishment, such an employee of the defendant having participated in the transaction, and treating her as having stolen from the defendant, acted within the scope of her authority as agent for the defendant. In *Kelly v. Shoe Co.,* 190 N. Car. 406, it was held that the "term 'manager,' applied to an officer or representative of a corporation, implies the idea that the management of the affairs of the corporation has been committed to him with respect to the property and business under his charge, consequently, his acts in and about corporation's business, so committed to him, are within the scope of his authority." In *Johnson v. Bouton,* 35 Neb. 898, it was said: "The rule is that any one who aids or assists in the unlawful imprisonment of another is chargeable as a principal." See, also, *Painter v. Ives,* 4 Neb. 122; *Fox v. McCurnin,* 205 Ia. 752; *Scott v. Flowers,* 60 Neb. 675. In the last case, Scott filed a complaint charging Sarah Jane Flowers with incorrigibility. The county court committed her to the industrial school for girls at Geneva. After she was released, an action for damages was brought against Scott. In the opinion it says: "It is argued by the same counsel that the consequential loss resulting to plaintiff is not the basis of an action for false imprisonment against Scott, since, had the county court performed its duty, there would have been no false imprisonment. It is true that the court made the finding and order of commitment; but the false imprisonment would not have occurred if no complaint had been filed. Defendant instituted the proceeding which resulted in the imprisonment of the plaintiff, and he cannot escape liability because some one

else equally with him was guilty of the wrong. Tortfeasors are jointly and severally liable for the damages flowing from their acts. And it is no answer to say that plaintiff has a right of action for false imprisonment against the county judge." The defendant Sears-Roebuck Company in this case through its contract with the Willmark System placed Behr in its store for the very purpose of apprehending dishonesty among the employees. In addition to this, its managers were authorized and directed to cooperate with him. It did in this case approve of irregular restraint of the plaintiff and sought to reap the benefits of it. This also answers the contention of the liability of Arndt and Sellers. Arndt was district manager for the defendant company and Sellers was the manager of the local store. The connection of these two defendants with the transaction has already been stated. It was such as to show not only an active participation in but an approval and ratification of the illegal restraint of the plaintiff.

There are certain assignments of error relating to the instructions which are unnecessary to discuss because of the views of this court as to the law of this case which would make them clearly improper. There is, however, a complaint that the verdict is excessive which requires our attention. It is difficult to determine just what the damages should be for a false imprisonment of this sort. Actual damages, as well as damages for mental suffering endured because of the false imprisonment, are recoverable. Worry, as well as indignity, humiliation, disgrace, and injuries to the feelings, are proper elements of mental suffering. These are matters which cannot be measured with accuracy. However, this court is of the opinion, after a consideration of the evidence, that that part of the verdict over $1,800 is excessive. It is therefore ordered that, if the plaintiff file a remittitur of $1,200 within twenty days, the judgment shall stand affirmed; otherwise, the judgment shall be reversed and the cause remanded.

AFFIRMED ON CONDITION.

PAINE, J., dissenting.

An opinion was released in this case July 20, 1933, in which four judges of the supreme court sat, and three district judges, and in that opinion only one judge dissented. It was argued again to this court on January 15, 1934, and three judges sat who had not heard the case before. I voted for the opinion, found in 125 Neb. 269, and no new facts were brought out in the second argument, or new law presented, which have changed my mind. Plaintiff brings suit for false imprisonment, and, instead of proving her case by a preponderance of the evidence, her evidence as to imprisonment is entirely uncorroborated in any particular by the three other witnesses who were present at any time during her alleged incarceration.

In an exchange for a more expensive paint brush, she received $1.10 additional in cash, which she failed in any way to account for or ring up on the cash register. The representative of the Willmark System examined the cash register tape and found that the $1.10 had not been recorded, and she explained in the manager's office that she kept the money because she needed it for bills because of sickness. He denies that she said to him that she left it on the cash register and it disappeared. After she had signed the two confessions, admitting taking money, she went to the rest-room, where she remained 30 minutes, and then she voluntarily went back to the manager's office, and Mr. Sellers asked her why she had done it, and she answered she did not know. He told her to stop crying, to go home and come back the next afternoon, and the next day she promptly went to an attorney's office and began an action for false imprisonment for $50,000. The testimony of the man who examined her was that the door was not closed, and remained open all the time that she was in the room. The testimony is not disputed by her that, up to the time that she signed the confession of taking the first $1.10, no threats of any kind had been made to her, and that she signed the first confession of

her own free will. The manager of the store was in his office, through a very thin board partition, and heard the hum of conversation, but not the words, and said that the entire conversation was conducted in a low tone by both of the parties. The only force used, that the plaintiff testified to, was this: That at one time she started to reach for a telephone on the table to call her husband, and that the telephone was pushed beyond her reach. This is absolutely denied, and rests solely upon her own evidence, and is disproved by two facts, namely, that when she was voluntarily remaining in the rest-room for 30 minutes, after the confession was all completed, she had no desire to, and did not, telephone her husband, and that when she voluntarily went back later to the office of the manager of the store to talk the matter over with him, and he asked her if she ought not to call her husband, she replied that her husband was not at home.

The evidence appears to show that this investigator was careful and cautious, his business was to detect stealing on the part of dishonest employees, and that from past experience, if for no other reason, he avoided the very things charged in this case. When she did confess, without any threats being made to her, by her own testimony, to the taking of the first $1.10 which she did not ring up because she needed it to pay bills because of sickness, he naturally asked her whether she had ever taken any other money belonging to the firm, and she admitted that she had been taking about $5 a day, and signed a written confession of this fact. This was her own confession, sitting quietly in the office, and of a fact not known to the investigator at all. The burden was upon the plaintiff to prove an unlawful restraint of her liberty. Taking her own testimony that she was called to the manager's office and talked with an investigator in a room to which the door was closed a portion of the time and open a portion of the time, and the only force used, according to her own testimony, was in pushing a telephone beyond

her reach, all of which facts are entirely unsupported by any other evidence, such evidence, I submit, does not prove her case by a preponderance of the evidence, and I am still of the opinion that our first opinion was right.

D. M. JOYCE, APPELLEE, V. CHARLES H. TOBIN ET AL.: JOHN C. SPRECHER, INTERVENER, APPELLANT.

FILED MARCH 9, 1934. No. 28863.

1. Bill of exceptions will be quashed which was not served on other party for examination and which was not settled as provided by statute. Comp. St. 1929, sec. 20-1140.
2. Appeal. Where there are no assignments of errors in appellant's brief, an affirmance is justified.
3. ———. Briefs which are not prepared in accordance with supreme court rule 13 may not be considered by court.
4. ———. Where bill of exceptions has been quashed, it will be presumed that evidence supports finding of fact of trial judge.
5. ———. Without bill of exceptions, the only question which can be presented to this court is sufficiency of pleadings to support judgment.

APPEAL from the district court for Colfax county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

John C. Sprecher, for appellant.

George W. Wertz, contra.

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

DAY, J.

This case was commenced by filing a petition for attachment and garnishment. John C. Sprecher intervened claiming title to the fund. The district court found for plaintiff and sustained the attachment and garnishment. The intervener appeals.

The bill of exceptions was heretofore quashed by this court on motion of appellee for that the purported one

(1) was not submitted to the adverse party for examination at any time, (2) was not presented to the trial judge for settlement, (3) and was not signed and settled by trial judge or another judge or by clerk of court, which is all provided for and required by section 20-1140, Comp. St. 1929. *Palmer v. Mizner,* 70 Neb. 200; *Madsen v. Norfolk Mill Co.,* 15 Neb. 644.

Briefs which are not prepared in accordance with supreme court rule 13 may not be considered by this court. *Pierce v. Domon,* 98 Neb. 120. The appellant's brief is not prepared in conformity to rule 13 of this court. There are no propositions of law set out. There are no assignments of error, and under the decision of *Gorton v. Goodman,* 107 Neb. 671, and *Dingle v. Gilbert,* 117 Neb. 237, an affirmance would be justified.

The only assignment of error which the brief could be construed to present is the insufficiency of the evidence to support the findings of the trial court. With the bill of exceptions quashed in the appellate court, it will be presumed that the evidence supports the findings of fact by the trial judge.

The only question which then remains is the sufficiency of the pleadings to support the judgment. *Gaines v. Warrick,* 113 Neb. 235. The sufficiency of the pleadings is not questioned.

AFFIRMED.

ERICK LARSON V. STATE OF NEBRASKA.
JOHN SKIDMORE V. STATE OF NEBRASKA.
LEE LYCAN V. STATE OF NEBRASKA.

FILED MARCH 9, 1934. NOS. 29056, 29057, 29058.

1. **Bail.** Recognizance given to perfect an appeal by defendant convicted of misdemeanor in county court which is not conditioned that defendant appear before the district court forthwith and from day to day thereafter, confers no jurisdiction on district court.

2. ———. Recognizance which provides that defendant convicted in county court shall personally appear forthwith on the first day of the next regular term and from day to day thereafter, and where court sits during present term, is not substantial compliance with statute regulating appeals, which provides that condition of bond shall require defendant to appear forthwith and from day to day thereafter.

ERROR to the district court for Keith county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

T. F. Nolan and *E. L. Hyde*, for plaintiffs in error.

Paul F. Good, Attorney General, and *George W. Ayres, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

DAY, J.

These cases present the identical problem. The evidence is identical, and they were argued together.

The plaintiffs in error were convicted in the county court of Keith county of the unlawful sale of intoxicating liquor—a misdemeanor. They attempted to appeal to the district court, but their appeals were dismissed upon motions of the state for that the recognizances filed were not in conformity with provisions of section 29-611, Comp. St. 1929. From these dismissals, plaintiffs prosecute proceedings in error to this court.

The recognizances were identical except as to names, and the condition is: "The condition of this recognizance is such that if the said (defendant) shall personally appear forthwith and without further notice at the district court of said Keith county, state of Nebraska, on the first day of the next regular term thereof and from day to day thereafter until the final disposition of such appeal to answer the complaint against him, and to abide the judgment of the district court, and not depart therefrom without leave until the final determination of the aforesaid cause wherein the said (defendant) is charged with the

crime of sale of intoxicating liquor then this recognizance to be void, otherwise to remain in full force and effect." Section 29-611, Comp. St. 1929, provides that defendant's recognizance shall be "conditioned for his appearance, forthwith and without further notice, at the district court of such county, and from day to day thereafter until the final disposition of such appeal."

In the case of *Killian v. State*, 114 Neb. 4, this court said: "A recognizance, given to effect an appeal by a defendant who has been convicted of a misdemeanor in the county court, and which is conditioned for his appearance at the district court on the first day of the next term, instead of forthwith, as the statute requires, is invalid and confers no jurisdiction on the district court."

In the more recent case of *Murray v. State*, 121 Neb. 278, it is said: "A recognizance, given to effect an appeal by a defendant who has been convicted of a misdemeanor in the county court, and which is not conditioned as the statute requires, is invalid and confers no jurisdiction on the district court."

Recognizance given to perfect an appeal by defendant convicted of misdemeanor in county court, which is not conditioned that defendant appear before the district court forthwith and from day to day thereafter, confers no jurisdiction on district court.

Plaintiffs in error contend that the bonds given substantially comply with the statute. This court held in *Abbott v. State*, 117 Neb. 350, that a substantial compliance, as where the first day of the next term was the first day upon which the court sat, was sufficient.

This is not the situation here, since the court actually sat two days, and the term did not adjourn until the next term commenced. There is no question of substantial compliance here.

Recognizance which provides that defendant convicted in county court shall personally appear forthwith on the first day of the next regular term and from day to day thereafter, and where court sits during present term, is

not substantial compliance with statute regulating appeals, which provides that condition of bond shall require defendant to appear forthwith and from day to day thereafter.

The judgments of trial court conform to the law.

AFFIRMED.

IN RE ESTATE OF WILLIAM W. HOAGLAND.
MARGARET B. SHOTWELL, APPELLANT, V. FIRST NATIONAL BANK OF OMAHA ET AL., APPELLEES.

FILED MARCH 9, 1934. No. 28796.

1. **Executors and Administrators.** When a nonnegotiable note, containing the words "For value received," is filed as a claim against an estate, the claimant is required to support the claim by proof of its execution and delivery.
2. **Appeal:** DIRECTION OF VERDICT. This court must assume the existence of every material fact favorable to the appellant, and give her the benefit of every reasonable inference therefrom, when the trial court has taken the case from the jury and directed a verdict at the close of her evidence.
3. **Bills and Notes.** If a nonnegotiable note contains the words "For value received," the note itself is evidence, not only of the promise, but *prima facie* of the consideration.
4. **Evidence.** A *prima facie* case means a case which has proceeded upon sufficient proof to that stage where it will support a finding if evidence to the contrary is disregarded, and, therefore, must be submitted to the jury, and not decided as a matter of law.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

George B. Thummel and *Richard Mackey,* for appellant.

Bryce Crawford, Jr., and *Finlayson, Burke & McKie, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

PAINE, J.

This action is founded upon a claim, filed against decedent's estate, upon a nonnegotiable promissory note, which recites, "For value received." The claim was rejected in the county court, and, upon appeal to the district court, trial was begun to a jury, but a judgment was entered discharging the jury and rejecting the claim.

William W. Hoagland, of Omaha, died December 9, 1931, and Margaret B. Shotwell filed a claim against his estate, founded upon a note executed by Hoagland, which read as follows:

"November 20, 1931.

"For value received I promise to pay to Margaret B. Shotwell the sum of fifty thousand dollars ($50,000.00) six months from date, with interest at 6%.

"In case of accident or death I request said Margaret B. Shotwell to present this promissory note to my executors.

"Margaret dear you have given me the only happiness I have ever known.

"W. W. Hoagland"

The executors filed many objections to the allowance of the claim in the county court. The county judge made an application to the county board to appoint a special county judge to hear these objections, and the county board, under authority of section 27-507, Comp. St. 1929, appointed L. J. TePoel as special county judge, with power to hear and determine said matter.

On June 6, 1932, an order was made in the county court, disallowing the claim, and it was stipulated that the cause should be tried in the district court upon the same pleadings. Upon January 9, 1933, a jury was duly impaneled in the district court, but at the close of the claimant's evidence the executors moved that the jury be discharged and judgment entered in their favor, which was accordingly done. The claimant appeals to this court on many grounds, among them being that the court erred in holding that the claimant had not made out a *prima facie* case.

The first evidence in the district court was that of Jay Fordyce Wood, of Chicago, as given in the county court. He testified that by profession he had been an examiner of disputed documents since 1910. He said he had read all the books published on the subject, and conducted a laboratory for such research. Bryce Crawford, Jr., admitted that upon request he had furnished Mr. Thummel with 26 checks, signed by W. W. Hoagland, which had been paid by the bank.

Mr. Wood then testified he had examined the promissory note under different degrees of magnification, and made photographs of it, and also photographs of the said 26 checks, a series of checks being photographed, with the signature on the note. He made answer to question No. 33 as follows: "My opinion was that the signature on plaintiff's exhibit number 1 was written by the same person who signed the name W. W. Hoagland to the checks, the signatures of which appear in enlarged form on exhibit number 4." Exhibit No. 1, of the county court, is the same as exhibit No. 2 of the district court, each referring to the $50,000 note in question. He testified that in his opinion the signature was made on the note, exhibit 2, after all of the typewriting had been completed.

The attorney for the executors consumed a great deal of time in the cross-examination of expert Wood in showing a fact plainly evident to the most casual observer, that the last two lines of typewriting in the note did not exactly line up horizontally with the other lines, showing that the old Underwood typewriter had slipped at one end in rolling up the paper, or that the paper had been adjusted, or possibly had been released, or even taken from the machine for a moment before completing. To enlarge upon this fact, a large-size photograph had been made for the executors, and upon five separate occasions attempts were made in vain by executors to get this photograph of theirs into the evidence. However, this photograph, not admitted in evidence, is printed as of page 13 of the appellees' brief, filed in this court. This statement

is made by them: "We feel that this question can be brought out more clearly to the court by a copy of the note, which has been lined both horizontally and vertically and which will show conclusively that the first six lines are not in line with the last two lines." Then follows this naive conclusion: "Therefore, there is no proof that the signature W. W. Hoagland on the instrument is in fact a signature to the note itself."

The claimant, being disqualified under section 20-1202, Comp. St. 1929, was not called as a witness. Her daughter, Margaret C. Shotwell, testified to seeing Mr. Hoagland in a sitting-room at their home on November 20, 1931, being the date of the note; that he was sitting on a couch beside her mother, who had the note in her hand, and that he was there from just before noon, perhaps a quarter of 12, until he left, between 2 and 2:30 p. m.; that both had been crying; that her mother stated in the presence of Mr. Hoagland that she was very blue; that she handed her the note and said, "Look what Uncle Will has done." This witness also testified that she had called Mr. Hoagland "Uncle Will" for as many as 15 years; that she read the note through, and that it contained all of the typewriting now on it, and also contained the signature, "W. W. Hoagland," at that time. At the close of her evidence the claimant rested, and Bryce Crawford, Jr., made a motion to dismiss the case, stating among other grounds that there was no sufficient evidence, and that the court had not been given an opportunity to sufficiently scrutinize the claim, and that the note, on the face of it and in the testimony, is indicative of a gift of a promissory note, which is unenforceable, and for the further reason that the claim is against public policy and against public morals.

After argument, the trial court made the following ruling: "The instrument on which this claim is founded is not a negotiable note, nor, in my judgment, a nonnegotiable note. It is a mere promise on the part of the signer to pay an amount to the one who presents the

claim against the estate. This being the case, it is in no wise controlled or governed by the law of this state in relation to negotiable instruments. If it is a mere promise to pay, then the words 'For value received' are a mere admission against interest sufficient only to create a presumption that there may have been a consideration for the promise. This is insufficient. In my judgment proof of consideration is necessary. For this reason the motion of the defendant for a directed verdict will be sustained." From this statement we see that the trial judge treated it merely as a claim against the estate, and not as a nonnegotiable note.

1. An examination of this note shows clearly that it is a nonnegotiable promissory note under the law of Nebraska, and that the law relating to nonnegotiable instruments applies to this note. When this claim was filed against the estate of the maker of the note, the claimant was required, in the first instance, to support the claim founded upon the note by proof of its execution by the maker and delivery to the payee; that, in addition thereto, consideration must be proved, but in this case, as the note bears on its face the words "For value received," it was not necessary for the claimant to prove consideration in making out her *prima facie* case in the first instance; and it has been held that, even where the petition did not state that it was given for a consideration, these words import a consideration, and that even the allegation thereof was not necessary. *Baker v. Thomas,* 102 Neb. 401.

2. It has been held in this state that this court must assume the existence of every material fact favorable to the appellant, and give her the benefit of every reasonable inference therefrom, when the trial court has taken the case away from the jury at the close of her evidence and directed a verdict. *State v. Havel,* 120 Neb. 832; *Central Nat. Bank v. Ericson,* 92 Neb. 396; *Nothdurft v. City of Lincoln,* 66 Neb. 430. When the claimant has established such a *prima facie* case, it is error to take the case away from the jury and dismiss the claim. Did not the trial

court draw inferences from the evidence which were not borne out by any proof introduced before it?

Much was made in the argument of a blue picture-card, to which the note was pasted permanently, entitled "Sweetheart of Mine," and which had printed upon it a light, sentimental verse. Is this fact, taken into consideration with all the other circumstances surrounding the note, sufficient to rebut the presumption that there was a consideration for this nonnegotiable note?

The second objection filed in the county court charges that his physical and mental condition was such that he was incapable of entering into such a transaction. In the brief it states that he was an old man, within three weeks of death; yet, when the demand was made by the claimant's counsel to furnish genuine signatures to send to the Chicago expert on disputed documents, 26 bank checks were furnished by the executors, which had been signed by him, 23 of the checks being drawn upon his personal account and 3 checks drawn by him upon the corporation account of Geo. A. Hoagland & Co., and the evidence shows that all of these 26 checks were dated either November 17 or November 18, 1931, being within 3 days of the time that he signed the note in dispute, thus clearly showing that at about the date of the note he was mentally acute and able to conduct many transactions daily for himself, as well as transactions for his corporation, in the payment and settlement of the matters which these checks completed.

In the century-old case of *Dugan v. Campbell,* decided in the December term, 1823, 1 Ohio, 115, we have a note reciting "For value received," and these words: "Payable in the currency of this place, if the said Dugan does not take it out in store goods at the same rate." The court said: "It is not necessary to decide whether the note in this case is or is not negotiable, or to adopt or reject the principles of the cases cited on either side; for if it were not negotiable within the rules of decision, we should nevertheless consider it a promissory note, im-

porting in itself a consideration. * * * Although the writing thus executed may want words of negotiability, or may contain conditions that destroy its negotiable character, the promisee rests in security upon his written contract, as evidence of his claim, and preserves no other proof of the transaction upon which it was founded. By common consent, actions have always been brought and sustained upon such instruments without setting forth or proving the consideration. Were the court now to establish a different doctrine, great mischief might ensue."

In *McKnight v. Cornet*, 143 So. (La. App.) 726, it is held: "Only where suspicion is cast on reality of note by party pleading want of consideration does burden of proving consideration shift to plaintiff." In *Killeen's Estate*, 310 Pa. St. 182, the court said: "The suspicious circumstances which would warrant the court in casting the burden of proving consideration on the obligee of a sealed nonnegotiable note should be such circumstances as amount to fraud on the maker, and nothing short of fraud should have that effect. * * * The law presumes against fraud and in favor of innocence."

3. *Bourne v. Ward*, 51 Me. 191, held that if the note contained the words "Value received," the note itself will be evidence, not only of the promise, but *prima facie* of the consideration.

The claimant was only required, in the first instance, to make out a *prima facie* case. How is that term defined?

"*Prima facie* evidence means sufficient evidence upon which a party will be entitled to recover if his opponent produces no further testimony." *Eckman Chemical Co. v. Chicago & N. W. R. Co.*, 107 Neb. 268.

Prima facie evidence means evidence that warrants the inference, but does not compel it; that calls for explanation or rebuttal and may make a case to be decided by the jury, but does not convert the defendant's general issue into an affirmative defense. *Gallup & Co. v. Rozier*, 172 N. Car. 283; *Purity Ice Cream & Dairy Co. v. Adams Express Co.*, 217 Mich. 593.

A *prima facie* case is that which is received or con-

tinues until the contrary is shown, and one which in the absence of explanation or contradiction constitutes an apparent case sufficient in the eyes of the law to establish the fact, and if not rebutted remains sufficient for that purpose. *Gilmore v. Modern Brotherhood of America,* 186 Mo. App. 445.

The establishing of a *prima facie* case, that is, a case which has proceeded upon sufficient proof to that stage where it must be submitted to the jury and not decided against the plaintiff as a matter of law, does not shift the burden of proof or necessarily mean that the judgment goes in favor of the plaintiff as a matter of law, but the jury are still the judges of the sufficiency of the showing, having in view the fact that the plaintiff has the burden of proof. *Smith Sand & Gravel Co. v. Corbin,* 75 Wash. 635.

"A *prima facie* case is one in which the evidence in favor of a proposition is sufficient to support a finding in its favor, if all of the evidence to the contrary be disregarded." *Schallert v. Boggs,* 204 S. W. (Tex. Civ. App.) 1061.

Perhaps the best statement of a *prima facie* case is this: "Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?" 5 Wigmore, Evidence (2d ed.) sec. 2494.

The executors submit two New York cases, which they claim support the trial court in the case at bar. The first is the case of *Dougherty v. Salt,* 227 N. Y. 200, in which it was shown that an elderly aunt, in the presence of an eight-year-old boy, suddenly decided to make provision for him, and the evidence of the claimant discloses all of the facts of the aunt's inquiry in regard to his school work and of her desire to do something for him, and of her finally putting that desire in the form of a note. The evidence of the claimant excluded all thought of any consideration of any kind, and there certainly could not have been any transactions of a business nature be-

tween this child and his aunt on the occasion of this visit or prior thereto. She was not paying a debt, she was conferring a bounty, and it is held that nothing is consideration that is not so regarded by both parties. The facts in that case justify the disposition made by Judge Cardozo.

The other New York case, involving the same questions, is that of *Blanshan v. Russell,* 32 App. Div. 103, 52 N. Y. Supp. 963, in which case it appears that Mr. De Witt executed and delivered to claimant a promissory note, which contained the recital "For value received." Upon trial of the claim, the plaintiff introduced testimony that the note was signed on the same day the maker of it died, and was given to her with the statement that "he had given her the note as a reward for what she had done for him."

It is quite evident that neither of these cases presents a situation like the case at bar.

This court has recently held that "presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference." *Lebs v. Mutual Benefit Health & Accident Ass'n,* 124 Neb. 491.

We find a discussion in 3 R. C. L. 924, 925, secs. 121, 122, which sets out that it is fundamental that an instrument given without consideration does not create any obligation at law or in equity in favor of the payee, but that bills of exchange and promissory notes are distinguished from all other simple contracts in regard to the proof of consideration, as it is an established principle that such instruments import a consideration; in other words, the law presumes a consideration, and proof thereof is unnecessary in the absence of evidence to contradict the presumption.

In 35 A. L. R. 1372, in discussing the burden of meeting a *prima facie* case, it says: "Whatever may be the true rule as to the burden of proving want of consideration in the sense of the risk of 'nonpersuasion,' there is no doubt that the defendant has the burden, in the sense

of going forward with the evidence and rebutting the *prima facie* case as to consideration, made out by the production of the instrument and its introduction into evidence."

This court has said that where evidence if uncontradicted would support a verdict, it is the duty of the court to submit the case to the jury. "It is not the function of the court to weigh the evidence for the purpose of saying how the verdict should go." *Blackwell v. Omaha Athletic Club*, 123 Neb. 332; *Glarizio v. Davis*, 110 Neb. 679. It is the function of the jury to weigh the evidence, and not the prerogative of the court.

We are led to the conclusion that the trial court erred in summarily taking this case from the jury and dismissing the same.

REVERSED AND REMANDED.

GOSS, C. J., and GOOD, J., concur in the result.

FRANK HAJEK ET AL., APPELLEES, V. JOSEPH F. POJAR ET AL.: JOHN RUZEK, APPELLANT.

FILED MARCH 9, 1934. No. 28819.

Mortgages: PRIORITIES. "Where a first mortgagee grants to the mortgagor an extension of the time for payment of the mortgage debt, but without any actual or intended discharge of the mortgage or taking a new one, and without any fraudulent intent as regards the second mortgagee, the latter cannot claim to be preferred to the first mortgagee merely on the ground of such extension." 41 C. J. 582.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

Simon A. Simon and *Adolph A. Carl*, for appellant.

Frank C. Charvat, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

BEGLEY, District Judge.

On August 29, 1925, the defendants Joseph F. Pojar and his wife, Julia, executed a promissory note to the

plaintiffs and appellees, Frank Hajek and Anna Hajek, for the sum of $27,000, due March 1, 1931, with interest at 5 per cent. per annum, and as part of the same transaction executed and delivered to the plaintiffs a mortgage upon the northeast quarter of section 5, township 20, range 5, in Dodge county, Nebraska, which mortgage was promptly filed for record and recorded. On September 5, 1925, the said defendants executed a second mortgage upon the same tract for the sum of $7,300 in favor of the defendants Frank C. Tomka, John Ruzek and the Farmers State Bank of Dodge, Nebraska. This mortgage contained an express recital that it was subject to a mortgage of $27,000. Thereafter the amount due the bank was paid and the interest of the bank in the mortgage was released. On March 1, 1931, when the said loan of $27,000 matured, the plaintiffs and defendants Joseph F. Pojar and wife entered into an extension agreement extending the maturity of said loan for a period of five years. This extension agreement changed the terms of the loan in two particulars: (1) In the place of payment; and (2) it reduced the rate of interest from 5 per cent. to 4 per cent. Subsequently the said defendants defaulted in the payment of interest and taxes, and plaintiffs instituted proceedings to foreclose their mortgage, joining the other defendants as parties to the suit. The bank appeared and disclaimed any interest in the premises involved, and the defendant Frank C. Tomka defaulted. The defendant and appellant, John Ruzek, filed a cross-petition setting forth the execution to him of a note of $2,000 and the execution and delivery to him of the said mortgage and default in the payment of the same and prayed that it be adjudged a first lien on the premises because it was of record at the time when the extension agreement was made, and asked for a foreclosure. The court found that the plaintiffs' mortgage of $27,000 constituted a first lien on the premises and that the defendant John Ruzek had a second lien in the sum of $2,000. From this decree John Ruzek has appealed.

The sole question for determination in this court is whether or not by the extension of its mortgage the plaintiff lost the right of a first lien and whether the appellant thereby acquired a first lien upon the premises.

In 41 C. J. 582, it is said: "Where a first mortgagee grants to the mortgagor an extension of the time for payment of the mortgage debt, but without any actual or intended discharge of the mortgage or taking a new one, and without any fraudulent intent as regards the second mortgagee, the latter cannot claim to be preferred to the first mortgagee merely on the ground of such extension."

The extension agreement continued the lien of the Hajek mortgage and all their rights and remedies thereunder for the new period, and having reduced the rate of interest on the first lien and the appellant having accepted a mortgage subject to said first lien, it cannot be said that the appellant has been injured by reason of the extension agreement.

Under the circumstances shown in this case, the plaintiffs and appellees did not lose their priority by merely extending the time of payment of their mortgage which was admitted to be prior to the mortgage of the appellant.

The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. DWIGHT STATE BANK, E. H. LUIKART, RECEIVER, APPELLANT: PLUM CREEK TOWNSHIP, INTERVENER, APPELLEE.*

FILED MARCH 9, 1934. No. 28674.

1. **Depositaries: TOWNSHIP FUNDS.** In order for a bank to become a legal depository, under the statute, for township

* On rehearing, paragraphs 1 and 2 of syllabus withdrawn. See opinion, p. 884, *post*.

moneys, it must make application therefor, and the governing body of the township must take positive action approving such application.

2. **Banks and Banking:** DEPOSIT OF TOWNSHIP FUNDS: TRUSTS. Where public moneys are left with a bank by a township treasurer without such bank having made application for a deposit of such funds, or being designated by the governing body of the township as a depository, and which funds are mingled with the general assets of the bank, such assets will be impressed with a trust to the extent of any balance in favor of the township as against the receiver of the bank.
3. **Depositaries:** TOWNSHIP FUNDS. Mere acquiescence by members of a township board, after knowledge that the township funds had been deposited in a bank, is not, of itself, sufficient to constitute such bank a legal depository of such funds.
4. **Banks and Banking:** TRUSTS. Where a bank receives moneys unlawfully, and such moneys are mingled by the wrong-doer with its general assets, and such assets are augmented as a mass to the extent of such moneys received, equity will impress the general assets with a trust in favor of the owner of such moneys so unlawfully received.

APPEAL from the district court for Butler county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

F. C. Radke, Barlow Nye, G. E. Price and *Phillip A. Tomek,* for appellant.

Coufal & Shaw and *Ray E. Sabata, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

CHASE, District Judge.

This is a suit in equity by which the intervener, Plum Creek Township, seeks to have its claim in the receivership of the Dwight State Bank declared a preferred claim by reason of an alleged trust relationship between the bank and the intervener.

On September 4, 1931, the Dwight State Bank was judicially declared to be insolvent and E. H. Luikart, secretary of the department of trade and commerce, was appointed receiver over the assets of the defunct corporation. In the receivership proceedings Plum Creek Town-

ship intervened, and by its petition it seeks to have the general assets of the bank in the hands of the receiver impressed with a trust in its favor for the sum of $855.59. A trial was had upon the issues presented by the petition of intervention, and the court found that the Dwight State Bank was a trustee for the intervener and allowed the intervener's claim in full. From such finding the receiver has prosecuted an appeal to this court.

The facts are not seriously in dispute. It appears that, for a number of years prior to the closing of the bank, Plum Creek Township had used this bank as its depository for its public funds. In January, 1931, one Prochaska assumed the duties of treasurer of the township, at which time he settled with the outgoing treasurer and had a balance in the bank to the credit of the township in the sum of $2.70. On January 21, 1931, the treasurer deposited with the Dwight State Bank the sum of $802.70, and on May 14 and June 13 of the same year he deposited $2,500 and $1,150, respectively. Checks were honored against this deposit from time to time, and when the bank closed there was left in the account to the credit of Plum Creek Township the sum of $855.59. When Prochaska became treasurer, one Novak, who was then president of the bank, called upon the treasurer and requested him to continue depositing the funds of the township in the bank. The treasurer followed the practice of the former treasurer and carried his official account there until the bank was finally closed. It also appears that no affirmative application was ever made by the Dwight State Bank to the governing body of the township for the privilege of keeping the township moneys on deposit in the bank, nor was there any affirmative action taken on the part of the governing body of the township approving the Dwight State Bank as a depository for its funds.

A determination of the question presented by the pleadings necessitates a construction of the recent enactments of the legislature on the subject of depositories for public funds.

Section 77-2525, Comp. St. Supp. 1931, provides: "That any school district treasurer or township treasurer may deposit the money received or held by him by virtue of his office in some state or national bank situated in such school district or township or in some nearby city or village which has been approved as such depository by the governing body of such school district or township."

Section 77-2526, Comp. St. Supp. 1931, provides: "Any such bank may apply for the privilege of keeping such moneys. All such deposits shall be subject to payment on check when demanded by the district or township treasurer. It shall be the duty of the school district board or township board to act upon such application."

Section 77-2527, Comp. St. Supp. 1931, provides: "No such treasurer shall be liable on his bond for money on deposit in a bank and by direction of the proper legal authority."

The receiver argues that no formal application is necessary on the part of the bank, and no formal designation as a depository on the part of the governing body of the township is necessary under the law, where the depository knows the public character of the funds and the governing body of the political subdivision knows that the funds have been and are still being deposited in the bank; that such acquiescence and ratification, as a matter of law, are equivalent to a formal application and designation.

In applying the usual canons of statutory construction to the act, we do not believe that the receiver's interpretation is well-founded. The legislative intent is quite clearly expressed by the language it employs. This language is not susceptible of a dual meaning. By the plain wording of the statute, the governing body of such a political subdivision as the intervener must approve the depository. The approval contemplated by the statute requires some positive or affirmative action on the part of the governing body from which the intent to designate is manifest. Mere silence on the part of the governing

body or each individual member thereof, with knowledge of the facts, is not such an approval as is contemplated by the statute. The approval necessary under the statute must result from positive action on the part of the board, and not from mere inaction. If the failure of the board to act could be clothed with any legal significance, it would be more in the nature of a disapproval than an approval, since it is negative in effect. The account of the intervener was solicited by the bank officers and carried in the bank in the name of Plum Creek Township, and the corporation knew at all times that these funds belonged to the intervener.

It is argued on behalf of the receiver that to hold the bank as an insurer of these funds, when it made no application therefor, is too unjust to receive equitable sanction. If any injustice flows from such a situation, it is brought about by the bank itself. If the bank desired to avoid liability under the statute, it had the privilege of refusing to receive the funds. This it did not choose to do; therefore, it must accept the liability which it assumed by voluntarily accepting the funds.

Under the theory of trustee and beneficiary which the intervener seeks to apply to this situation, the depository never acquires title to the money, but merely holds it as an equitable bailee with an obligation to return upon demand. The relationship is not one of debtor and creditor as grows out of an ordinary deposit. The rule adopted by this court in recent cases is to the effect that, where a bank receives money under circumstances of which it could not become a legal depository, the law will impress the funds thus received with a trust in favor of the owner of the fund. The bank treated these funds as an ordinary deposit, mingled the same with the general assets of the bank, and $855.59 thereof it had on hand to the credit of the intervener when it was closed. In the recent case of *State v. Bank of Otoe,* 250 N. W. 547 (125 Neb. 414), which we take to be controlling in this case, the court

laid down the following rule: "Bank, not designated as depository, receiving deposit of funds from school district treasurer, who was also active managing officer of bank, held funds as trustee, entitling school district to preference on bank's insolvency." While the above case has special reference to school districts, townships are included in the same section of the statute.

It is also argued by the receiver that it became the duty of the township board to act upon the bank's application for the deposit of funds. We find nothing in the record indicating that the bank ever applied to the governing body of the township for the privilege of keeping its funds. The only place the record hints of such a fact is where the president, Novak, asked the treasurer to keep the money in his bank. We cannot feel justified in holding the township guilty of such dereliction of duty in failing to act upon an application when no such application was ever made.

The receiver further argues that the intervener has not sufficiently traced the funds entitling it to impress the assets of the bank with a trust. The ancient equitable doctrine requiring the tracing of trust funds has been somewhat relaxed by our recent decisions. In *State v. Farmers State Bank*, 121 Neb. 532, it was held that, where the trust funds were traced into the general assets of the bank, and the assets were augmented as a mass to the extent of the funds received, notwithstanding the identical money was mingled with other corporate funds, the funds were traced sufficiently to impress the general assets with a trust, and the amount of the funds so mingled was an asset belonging to the intervener and never became an asset of the bank.

Applying the doctrine to the instant case the judgment is

AFFIRMED.

STANDARD INVESTMENT COMPANY, APPELLANT, V. MARTIN FISHER, APPELLEE.

FILED MARCH 16, 1934. No. 28832.

1. **Trial.** Questions of disputed facts are for the jury.
2. **Bills and Notes: FRAUD: BURDEN OF PROOF.** In an action against the maker by an indorsee of a promissory note, where defendant pleads and there is any evidence tending to show fraud in the inception of the note, the burden is on plaintiff to show that it is a *bona fide* holder; and where, from the evidence, reasonable minds may reach different conclusions, the question of good faith is for the jury. *Union Nat. Bank v. Moomaw*, 106 Neb. 388.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

Harry R. Ankeny, for appellant.

J. C. McReynolds, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and MEYER, District Judge.

GOSS, C. J.

Plaintiff sued Martin Fisher and N. F. Babson upon a promissory note. Babson, though served, defaulted. The jury returned a directed verdict against Babson and returned a verdict in favor of Fisher. From a judgment in favor of Fisher, plaintiff appealed.

On May 15, 1931, Fisher executed and delivered the note for $199, due September 1, 1931, to N. F. Babson and Vic Christensen. On May 29, 1931, these payees, for value, indorsed and delivered the note to plaintiff, which sued as owner and holder in due course. Babson and Christensen were insurance solicitors for United Insurance Company of Lincoln, Nebraska. They took the note to pay the premium for a 60 months' policy providing Fisher with indemnity for certain injuries, if accidental, and for loss of time by disease. The policy was issued May 16, 1931, and delivered before the note was sold to plaintiff. Fisher undertakes to rescind, now claiming fraudulent rep-

resentations by Babson and Christensen as to the insurance, though in his correspondence with Babson and with the insurance company he seems to have based his desire to have the note and policy canceled because of his financial inability. He finally returned the policy to the company on June 13, 1931, requesting its cancelation and that the note be returned. The insurance company wrote him the policy would be held subject to his order.

By his answer defendant denied that plaintiff was a holder in due course; alleged that plaintiff was not the real party in interest, but that it is a dummy corporation owned and controlled by the insurance company, which was the real party in interest; that there was fraud in the inception of the note whereby Babson and Christensen represented to defendant that the full amount of "one year's premium" on a policy was the sum of $172, but by deceit and fraud they wrote into the note and made it out in the sum of $199. There were other recitals in the answer, but it is not necessary to notice them as they were not submitted to the jury and are not involved in the assignments of error.

Section 62-402, Comp. St. 1929, says: "A holder in due course is a holder who has taken the instrument under the following conditions: First, That it is complete and regular upon its face; Second, That he became the holder of it before it was over-due and without notice that it had been previously dishonored if such was the fact; Third, That he took it in good faith and for value; Fourth, That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The fourth instruction to the jury is assigned as erroneous. It was as follows:

"Under the pleadings and evidence in this case the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that it acquired title to the note in controversy as a holder in due course. It has failed to establish the good faith required by that burden

in that it has not made the investigations required of it to affirmatively establish that its representatives acted in good faith.

"This does not remove from the jury the issue that misrepresentations were made as to the amount of the insurance premium as represented in the note given. That question is to be considered by you just the same as if this note still remained in the hands of the original payees."

By the second sentence of the instruction the court specifically decided as a matter of law that plaintiff failed to establish the good faith necessary to support the burden of proof required, in that it did not make the investigation required of it to establish that its representatives acted in good faith. Appellant assigns that this instruction was erroneous because by the instruction the court decided as a matter of law that plaintiff was not a holder in due course. The officers of the investment company and of the insurance company seem to be the same persons and to hold to a considerable extent the same offices in both companies. That, however, is not incompatible with good faith on the part of plaintiff in becoming a holder in due course. Sale or pledge of a promissory note given to pay an insurance premium is unlawful prior to the delivery of the policy. Comp. St. 1929, sec. 44-1119. When Babson offered the note for sale and plaintiff purchased it on May 29, 1931, the officer asked Babson if the policy had been delivered and was answered in the affirmative. There is other evidence that the policy had been delivered to the insured and was then in the possession of the insured. As shown by the fourth, sixth and seventh instructions, the only defense submitted to the jury was the writing of the note for $199 instead of $172. All others were specifically withdrawn from the jury. Fisher's pleading and testimony, as well as the evidence and circumstances generally, make the whole matter of good faith and representations, both of Fisher and the insurance solicitors, peculiarly a question for the jury. Plaintiff was

handicapped by having its good faith in the purchase of the note decided against it by the court. It seems to us that it was for the jury to decide upon the entire evidence.

The reliance of the appellee is upon *State Bank v. House,* 114 Neb. 681. There a majority of this court reversed and dismissed a cause where there had been a directed verdict for plaintiff. The bank had purchased a note executed for the purpose of paying the first premium on an insurance policy. The insurance solicitor, Fowler, who was payee, never even forwarded the application and of course no policy was ever issued or delivered; in fact, the whole transaction was a fraud on the part of Fowler. The bank took the word of the payee that the policy had been delivered and the cashier did not inquire of the maker, who was a farmer living five miles from town, having a telephone, and known to the cashier for 15 years. The cashier merely asked Fowler, a perfect stranger, if the policy had been delivered and relied upon his affirmative answer without further inquiry. The court decided that this was not sufficient evidence to authorize a judgment which would allow the consummation of a fraud. But, in the instant case, the policy was delivered; and there is a dispute between Fisher and Babson as to the alleged misrepresentations about the amount of the premium, the truth of which is certainly not a matter which all men would unhesitatingly decide in favor of Fisher's version. Some ordinary, fair-minded jurors might reasonably draw other inferences from the evidence. He said in his answer the policy was to cost for one year's premium $172 and no more. The application signed by him recited the premium as $199 for 60 months. In his testimony he thought the amount was $171 or $172. In his letters he sought to have the policy canceled because his farm and chattels are mortgaged and farm prices are low, because it would take 600 bushels of wheat to pay the premium, and the like. These letters were written at and after the time the note was purchased by plaintiff. Can it be said as a matter of law that Fisher would have made

any other answers to plaintiff if plaintiff had inquired of him? He did not then claim his contracts were invalid. He was seeking their cancelation. A good jury might infer that his defenses are afterthoughts and spurious. So we do not think the facts are at all parallel with those in the *House* case. In such cases the good faith of plaintiff is for the jury. *Ostenberg v. Kavka*, 95 Neb. 314; *Union Nat. Bank v. Moomaw*, 106 Neb. 388; *Auld v. Walker*, 107 Neb. 676.

For the failure to submit the cause to the jury the cause must be reversed. The sixth instruction referred to a "material alteration" in the note. As applied to negotiable instruments, that phrase is defined in section 62-807, Comp. St. 1929. It refers to changes made in a negotiable instrument after the instrument is originally executed. The instrument here was never altered. The court in stating the issues raised by the answer did not include any plea that the note had been altered. The answer did not allege it. The real issues were whether plaintiff was a holder in due course and whether, if it was not a holder in due course, the note was unenforceable because, by misrepresentation and fraud, the maker was induced to sign a note for a larger and different amount than he claims was agreed upon as the amount of the premium for his insurance policy. On another trial this phrase will probably not be used.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

E. H. LUIKART, RECEIVER, APPELLANT, V. HARRY TIDRICK ET AL., APPELLEES.

FILED MARCH 16, 1934. No. 28846.

1. **Fraudulent Conveyances: BURDEN OF PROOF.** Where husband transfers property to wife, which prevents his creditors from enforcing payment of their claims, it is presumptively fraudu-

lent as to them, and the burden is upon wife to prove otherwise.

2. ———: CONSIDERATION. A *bona fide* debt due from husband to wife is a good and sufficient consideration to support conveyance of property as security for such debt.

3. ———. An insolvent debtor may in good faith pay or secure valid debt of one creditor to exclusion of others.

4. ———: ESTOPPEL. Evidence in this case does not establish an estoppel by misrepresentation, silence or laches.

APPEAL from the district court for Wayne county: CHARLES H. STEWART, JUDGE. *Affirmed.*

F. C. Radke, Barlow Nye and *James E. Brittain,* for appellant.

H. E. Siman, contra.

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

DAY, J.

This is a suit brought by the receiver of the Merchants State Bank of Winside, as judgment creditor, against Harry Tidrick, as judgment debtor, and Mae Tidrick, his wife, in the nature of a creditor's bill to set aside, in aid of execution, two bills of sale of personal property given by the husband to his wife. The receiver appeals from an order dismissing the suit.

The allegations of the receiver's petition are that on July 28, 1932, he recovered two judgments against Harry Tidrick on notes given to the bank prior to December 10, 1931; that executions had been returned *nulla bona;* that the instruments were executed March 7 and May 28, 1932, respectively, for the purpose and with intent to hinder, delay and defraud his creditors, especially the plaintiff; that there was no consideration and no change of possession of the personal property; that at the time these instruments were executed Harry Tidrick was indebted to plaintiff; and that the credit had been extended, relying upon his ownership of this personal property and owing his wife nothing as represented by his property

statements, which facts were known to his wife and estopped her from asserting a claim to this personal property.

The answer of defendant, Mae Tidrick, alleges that her husband was indebted to her, which was a good and sufficient consideration for the bills of sale. Both defendants denied fraudulent intent, and that the bank extended credit relying upon Harry Tidrick's ownership and lack of any indebtedness to his wife. The reply alleges that the purported debt was not a legal obligation of the husband to his wife; that she was estopped to assert a claim to the personal property; and that such claim was barred by her laches.

The Tidricks have lived for 35 years upon a 320-acre farm which has at all times been the property of Mrs. Tidrick. Mr. Tidrick operated the farm and borrowed money from various banks. In 1921 he was indebted over $8,000 to the Farmers State Bank of Winside when that bank was closed for insolvency. In May, 1921, Mae Tidrick executed a mortgage on the 160 acres of her land, not occupied by the buildings as a homestead, to the Forgan Investment Company to secure $8,000 to pay Harry Tidrick's debt to the bank.

Subsequent to this, Harry Tidrick commenced doing business with the Merchants State Bank, and the indebtedness represented by the receiver's judgments was contracted during the years since. It seems that he was continuously indebted to the bank during this time, sometimes for a larger amount than others. From time to time he signed property statements for the bank. When the Merchants State Bank was closed, it held two notes of Tidrick, dated August 12, 1931, and September 4, 1931, for $550 and $630, respectively, due February 12 and March 4, 1932.

About February 1, 1932, the receiver's agent, in charge of the bank, notified Tidrick that these notes were due. It was suggested that he give a chattel mortgage on his personal property or secure Mrs. Tidrick's signature on a

note. This was not done. The receiver threatened to sue and shortly thereafter commenced action and secured judgments July 28, 1932.

Meanwhile the $8,000 mortgage Mrs. Tidrick had given on her land to pay Harry Tidrick's debts in 1921 had been renewed twice and had not been paid or reduced in amount, but was not due at this time. Mrs. Tidrick knew about the letters from the receiver to her husband and insisted that he give her some security for the debt. Tidrick then gave his wife two bills of sale of his personal property located on the farm where the parties resided.

The appellant rightly contends that the law is that where a husband transfers property to his wife, which prevents his creditors from enforcing payment of their claims, it is presumptively fraudulent as to them, and the burden is upon the wife to prove otherwise. *Glass v. Zutavern,* 43 Neb. 334; *La Borde v. Farmers State Bank,* 116 Neb. 33, and many other cases too numerous to cite. "This court has frequently held that a deed by a debtor to an immediate member of his family is presumptively fraudulent as to existing creditors, and in litigation between him and the grantees on that issue the burden is on the vendee to establish the good faith of the transaction by a preponderance of the evidence. *Christensen v. Smith,* 123 Neb. 388, and cases cited therein." *Peterson v. Wahlquist,* 125 Neb. 247. However, this is merely a rule of evidence which has for its purpose the prevention of fraud and recognizes the natural tendency of relationships which sometimes induce them to protect each other from the legitimate claims of creditors. But the law does not prohibit business transactions between husband and wife. It merely recognizes that, where the transactions intervene the right of creditors of the husband, they shall be closely scrutinized.

Did the appellees in this case sustain the burden of proof and establish by a preponderance of the evidence that the sale was not fraudulent? There was a good and sufficient consideration for the bills of sale. In 1921 the

wife executed a mortgage on her individual property to secure $8,000, every dollar of which was paid to the receiver of the Farmers State Bank of Winside on her husband's debt. That mortgage had been renewed twice without reduction and was not due at the time the bills of sale were executed. The wife testified, as also did the husband, that he had agreed to pay back this amount. He had paid the interest all the time. It was unquestionably a *bona fide* debt. A *bona fide* debt due from husband to wife is a sufficient consideration to support conveyance of property as security for such debt. *Farmers & Merchants Irrigation Co. v. Brumbaugh,* 77 Neb. 702; 27 C. J. 562.

A debtor may, in the absence of fraud, prefer one creditor over another. The rule is stated in 27 C. J. 634: "An actual preference of a valid debt is not rendered fraudulent by the fact that it was made and accepted with the intent to defeat a judgment or execution against the debtor." An insolvent debtor may in good faith pay or secure a valid debt of one creditor to the exclusion of the others. *Kilpatrick-Koch Dry Goods Co. v. McPheely,* 37 Neb. 800; *Farwell Co. v. Wright,* 38 Neb. 445; *Chaffee v. Atlas Lumber Co.,* 43 Neb. 224.

Is Mrs. Tidrick estopped in this case to claim the personal property against the creditors? The appellant grounds his proof of estoppel on the part of the wife upon a property statement made by the husband to the bank January 22, 1931, in which it is claimed he did not list as a debt the $8,000 now claimed due his wife. There is no evidence that Mrs. Tidrick made this statement to the bank or knew anything about it. It does not appear that she had by any act or misrepresentation misled any one to his prejudice. Anyhow the property statement taken by the bank did not mislead any one about anything. We refrain from further comment upon that property statement which is and was in 1931 interesting fiction incapable of deceiving any one, even a banker or bank examiner. There is no evidence of an estoppel by her mis-

representation or by silence when it was her duty to speak.

Is Mrs. Tidrick estopped by her laches to assert her claim against her husband? In this connection the appellant relies strongly upon *Wake v. Griffin*, 9 Neb. 47. The facts distinguish the case at bar from the *Griffin* case which is clearly evident from a reading of the entire case. Even the syllabus refers to the transaction as a pretended loan of money. The evidence is clear and convincing in this case that there was a loan of money. Appellant emphasizes the fact that when the husband inherited considerable money he did not pay the mortgage on his wife's land. The evidence is that they talked about the matter, and she permitted him to pay instead his indebtedness to this same bank, because the interest on the mortgage was lower, and it was not then due. The interest was paid by Mr. Tidrick and until default of payment of interest or principal Mrs. Tidrick was not injured.

An examination of the assignments of error and the argument thereon does not disclose error on the part of the trial judge. Our conclusion is the same as that of the trial court.

AFFIRMED.

FRED WALLER, SR., ET AL., APPELLANTS, V. FIRST TRUST COMPANY, APPELLEE.

FILED MARCH 16, 1934. No. 28975.

Bills and Notes. Where a note has been paid, an action cannot be maintained to recover usurious interest.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Sterling F. Mutz and *Edward C. Fisher*, for appellants.

Stewart, Stewart & Whitworth, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and MEYER, District Judge.

DAY, J.

This is a suit brought by Fred Waller, Sr., and Fred Waller, Jr., hereinafter called "Waller Signs," for an accounting on a series of loans made to them by the Lincoln Safe Deposit Company to determine the amount due to obtain credit for claimed usurious charges and commissions exacted by the lender. Upon a trial the court found in favor of defendant, First Trust Company, and dismissed the suit.

In May, 1927, Waller Signs required large sums of money for the prosecution of their business. They sought to negotiate a loan of $50,000 with the Lincoln Trust Company and the Lincoln Safe Deposit Company. This loan was made, and bonds were issued and sold to a large number of investors. The method adopted was to make the Lincoln Safe Deposit Company trustee for the bondholders and, as such, Waller Signs executed an agreement and assignment of a signboard contract with the Skelly Oil Company under which payments made by Skelly Oil Company were assigned to the trustee for the purpose of paying these bonds. As additional security for the bonds, Waller Signs also executed to the trustee a chattel mortgage on the signboards. Six months later, while there was due on these bonds $35,000, an additional sum of $32,500 was advanced. Again, in February, 1929, with bonds outstanding in the amount of $38,500, the loan was increased to $107,500, and in November, 1929, certain of these bonds were extended. In February, 1930, an additional $65,000 was added, making total bonds $162,500, and again in October, 1931, with $92,500 outstanding, $2,500 was added, making total $95,000. In each instance, the loans were split into bonds of various denominations and sold generally to the public.

At each advancement of additional sums and also at the

time some of the bonds were extended, the Lincoln Safe Deposit Company or the Lincoln Trust Company, or both, received substantial commissions. The Lincoln Trust Company and the Lincoln Safe Deposit Company were in very close relationship, and the loan papers were executed to the latter, and the former assumed to act as agent in selling the bonds and collecting the commission. On July 6, 1932, both companies were adjudged bankrupt, and on July 21, 1932, the defendant, First Trust Company, was appointed successor trustee. The successor trustee continued to receive payments on the contract of the Skelly Oil Company and pay the Waller Signs bonds until plaintiffs commenced this suit. Since that time, they have received more than $60,000 from the Skelly Oil Company, sufficient to pay all the outstanding bonds.

The plaintiffs base their cause of action largely upon the allegation that the loan was usurious. They complain that the trial court excluded material evidence relating to all previous loans offered to establish that the loans were usurious. The commissions charged upon the various loans, added to the contract rate of interest, rendered the loan usurious. Dealing, as we must, with the outstanding bonds, amounting to a small portion of all the bonds issued, we have this situation: The First Trust Company is the trustee of these bondholders and, as such, has received payments of these bonds from the Skelly Oil Company under its contract with Waller Signs, assigned to the trustee and to its successor trustee by the plaintiffs herein. The plaintiffs in the assignment of this contract with Skelly Oil Company directed it to pay the money due thereunder to the trustee for the bondholders. When Skelly Oil Company made the payments, as directed, to the trustee for the bondholders, it was the equivalent of Waller Signs paying the bonds. Conceding, therefore, that the evidence establishes usury in this transaction, which of course it does not, Waller Signs has paid the bonds affected by usury. True, the bondholders have not

received the money, but their trustee has, and they are entitled to the same and would have it except for this suit. The plaintiffs seek to impound this money in the hands of the trustee due to a few bondholders and take their money to recoup themselves for many thousands of dollars of alleged usurious charges. They evidently are unmindful of the fact that usury is a defense and not the basis of an affirmative action. Comp. St. 1929, sec. 45-105. The law of this jurisdiction is that, where a note has been paid, an action cannot be maintained to recover usurious interest. *Blain v. Willson,* 32 Neb. 302; *First Nat. Bank v. Barnett,* 51 Neb. 397; *New England Mortgage Security Co. v. Aughe,* 12 Neb. 504. If the amounts paid by Skelly Oil Company on the Waller Signs bonds under the contract were insufficient to pay the bonds and it were necessary to proceed against Waller Signs, usury, if any, would be an available defense. But that is not this case.

Since this court takes the view of the case heretofore expressed, other matters argued in the briefs, such as negotiability and ownership of the bonds and the amount of the charge for the money, are not necessary to a decision. Appellants also contend there is a matter of a credit of $2,074 which was paid to the former trustee. If this is a fact, it is a matter for adjustment in the bankruptcy proceedings in the federal court. This court has no jurisdiction over the affairs of that company. The same is applicable to its alleged ownership of some of the bonds involved herein.

The judgment of the trial court in dismissing the case was a proper judgment.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. PLATEAU STATE BANK, E. H. LUIKART, RECEIVER, APPELLANT: VILLAGE OF HERMAN, INTERVENER, APPELLEE.

FILED MARCH 16, 1934. No. 28809.

1. **Banks and Banking**: VILLAGE FUNDS: TRUSTS. Where village treasurer deposited funds of village in a state bank which had knowledge of their character, but which had not been designated as depository, bank held funds as trustee, and, on its insolvency, village was entitled to a preferred claim for trust funds which had been mingled with bank's general assets.
2. **Estoppel.** Where there is a positive law prohibiting the village treasurer from depositing village funds in any bank not designated by the board of trustees as a depository, the village is not estopped by any act done in violation of said law by the village treasurer.
3. **Banks and Banking**: INSOLVENCY: TRUST FUNDS: INTEREST. A claim adjudicated to be trust funds payable from assets of insolvent state bank in preference to depositors' claims is in effect a judgment, which bears interest at the rate of 7 per cent. per annum from date rendered until paid.

APPEAL from the district court for Washington county: CHARLES LESLIE, JUDGE. *Affirmed.*

F. C. Radke, Barlow Nye, G. E. Price and *O'Hanlon & O'Hanlon,* for appellant.

Brogan, Ellick & Van Dusen, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

BEGLEY, District Judge.

The Plateau State Bank of Herman, Nebraska, became insolvent and was closed on February 22, 1932. The vice-president and managing officer of said bank, Earl C. Burdic, was also the village clerk of the village of Herman. At the time said bank was closed the treasurer of the village of Herman had on deposit with said bank certain funds of said village to the amount of $4,713.73. Said money was deposited with said bank without the bank

having complied with the provisions of section 17-515, Comp. St. 1929, as amended by chapter 33, Laws 1931, by giving a bond as therein required, and without having any action taken by the village council in designating said bank as a depository of such money. After the closing of said bank the village of Herman brought an action to establish a preferred and prior claim in its favor by reason of said deposit having been made by the treasurer of the village of Herman, and upon a trial the court found that the village of Herman was entitled to a preferred claim in the sum of $4,859.49 with interest at 7 per cent. per annum from September 21, 1932, the date of the order. From this order of the district court the receiver has appealed.

The receiver first claims error in the finding that said funds were trust funds and entitled to priority. Particularly does he claim error in holding that certain district paving funds held by the village of Herman as trustee for the Herman paving district and deposited in said state bank were held to be trust funds.

It is undisputed that the bank at all times knew that the funds deposited were village funds, not only from the title of the accounts as carried on the books of the bank, but also because the vice-president and managing officer had such knowledge as city clerk. The bank therefore was charged with the knowledge that it was holding the moneys of the village, not as a depository of such funds, but solely as custodian thereof for the benefit of the village, and that consequently the relation of the ordinary depositor to the bank did not arise.

Neither the bank nor the village complied with the provisions of said section 17-515, which provides that it is the duty of such banks as desire to be designated as depositories to apply for such privilege upon certain conditions, and it shall then be the duty of the city council or board of trustees to act on such application, and all banks as may ask for such privilege shall give a bond in such sum as shall be the maximum amount on deposit at any

one time, and the council shall approve such bond, and the city or village treasurer shall not deposit such moneys or any part thereof in any bank or banks other than such as have been so selected by the city council or board of trustees for such purposes. This being a positive law and the city treasurer and the bank having failed to comply with the same, the deposit constituted a trust fund for the benefit of the village, and it would make no difference from what source the money was received by the treasurer so long as it was deposited by him as custodian of the city funds. *State v. Midland State Bank,* 52 Neb. 1; *Nebraska State Bank v. School District,* 122 Neb. 483; *Massachusetts Bonding & Ins. Co. v. Steele,* 125 Neb. 7; *State v. Bank of Otoe,* 125 Neb. 383.

The appellant also contends that the village, by acquiescing in the deposit of the village funds and remaining silent while the transaction continued, is estopped now to assert that same were not legally deposited in said bank. This defense was not pleaded and there is no showing that any one relied to its disadvantage upon any acquiescence or silence on the part of the village trustees; and further the public is not estopped by the unauthorized acts of its officials. In this case there was a positive law prohibiting the village treasurer from depositing village funds in the plaintiff bank. The public had a right to assume that the officers would obey the law and are not bound by any illegal acts upon their part. 21 C. J. 1191.

Finally, the appellant contends that the court had no authority to allow interest on the judgment. This court has already decided that the appellee is entitled to interest from the date of the judgment. *State v. First State Bank,* 124 Neb. 786; *Capital Nat. Bank v. Coldwater Nat. Bank,* 49 Neb. 786; Comp. St. 1929, sec. 45-104.

The judgment of the district court is correct and is therefore

AFFIRMED.

LUTHER COLLEGE, APPELLEE, V. EMIL BENSON ET AL., APPELLANTS.

FILED MARCH 16, 1934. No. 28741.

1. Insurance: FIDELITY BOND: "EMBEZZLEMENT." In a fidelity bond insuring an employer against loss sustained by any act of embezzlement on the part of the employee, the word "embezzlement" is to be construed broadly in its general and popular sense, rather than in a narrow and technical spirit with specific reference to the criminal statute of the state.
2. ———: ———. A fidelity insurance company agreed to pay employer any pecuniary loss, not exceeding $10,000, sustained by any act or acts of embezzlement on the part of the employee; and conditioned, in the event the loss exceeds the amount of the suretyship, the employer and the surety shall share with each other *pro rata* in any net recovery, in the proportion that the amount of the payment under this suretyship bears to the total shortage. *Held*, that, until the company has made payment, it has borne no loss and is not entitled to share in any recovery, unless the net recovery should reduce the aggregate amount of loss to a sum less than the amount of the suretyship.
3. ———: ———. Bond guaranteeing fidelity of employee is a form of insurance and subject to the rules applicable to insurance contracts generally, and not to the rules applicable to ordinary sureties for accommodation, and section 20-1544, Comp. St. 1929, does not control procedure on entering judgment thereon.

APPEAL from the district court for Saunders county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

Montgomery, Hall & Young, for appellants.

Hendricks & Kokjer, contra.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

ELDRED, District Judge.

Luther College, appellee, is a religious educational corporation. The appellant Emil Benson was its treasurer, and appellant American Surety Company of New York was surety on the bond of Benson, as such treasurer.

Suit was brought by the college to recover from Benson and the surety company on such bond for funds and property of the college alleged to have been embezzled or converted by Benson to his own use. A jury was waived and a trial had to the court, which resulted in a judgment for plaintiff against both defendants for the sum of $10,000, with interest and costs, including $700 taxed as an attorney fee, from which the defendants have appealed.

The bond which is the basis of this suit, so far as material to the first question considered on this appeal, is as follows:

"We, Emil Benson, Wahoo, Nebraska, as principal, hereinafter called the 'employee,' and the American Surety Company of New York, as surety, bind ourselves to pay Luther College, Wahoo, Nebraska, as employer, such pecuniary loss, not exceeding ten thousand dollars, as the latter shall have sustained of money or other personal property, * * * by any act or acts of larceny or embezzlement on the part of the employee, directly or through connivance with others, while in any position or at any location in the employ of the employer."

By the first two assignments of error it is urged that the judgment is not sustained by the evidence and is contrary to law. These assignments are considered together. The question is: Do the acts relied on by the appellee constitute embezzlement by the employee, Benson, directly or through connivance with others? Appellants contend they do not, and that, consequently, no liability under the bond was established. While the bond covers larceny as well as embezzlement, the appellee in its petition does not allege that there was any larceny by Benson, so that term is not involved.

Appellant Benson, in addition to being treasurer of Luther College, was also the vice-president and cashier of the Citizens State Bank of Wahoo, the capital stock of which was $20,000, divided into 200 shares of $100 each, nearly 109 of which were owned by Benson. Funds in

the hands of appellant Benson, as treasurer of Luther College, were deposited in the Citizens State Bank of Wahoo.

During March and April, 1927, Benson loaned $10,000 of the college funds, which he had deposited as treasurer of said college in said bank, to the Central Bridge & Construction Company, and received as evidence therefor two notes of said company for $5,000 each, payable to the Citizens State Bank of Wahoo. Both of the notes, and the interest accrued thereon, were paid December 30, 1927, and the amount received placed in the account of the bank known as the collection account. Under date of January 14, 1928, $7,500 of the sum paid on the notes by the Central Bridge & Construction Company, and credited to the collection account of said bank, was charged out of that account, and $3,400 thereof was credited to the bank's bills receivable account for the John Mashacek note and mortgage, which was carried as bills receivable of the Citizens State Bank. The remaining $4,100 was credited to the account of the City National Bank of Lincoln, which paid a personal note of Emil Benson and one J. M. Oshlund. On February 4, 1928, $2,500 of the amount paid on the notes of the Central Bridge & Construction Company was withdrawn from the collection account of the bank and deposited to the account of Benson as treasurer of Luther College. By the foregoing transaction the appellee contends that there was embezzled and converted by appellant Benson $7,500 of the principal sum originally loaned the Central Bridge & Construction Company, and $564.55 on account of interest.

On February 6, 1928, appellant Benson withdrew from the Citizens State Bank funds of Luther College, theretofore deposited to his credit as treasurer of such college, $5,000 by two checks, one for $2,500 on endowment fund, and one for a like amount on educational fund, both checks made payable to "mortgage and note." Both checks were paid on that date. It appears that $1,000 of the sum thus withdrawn from the account of Luther College was cred-

ited to the account of Joseph Ericson, and $4,000 credited to the bills receivable account of the bank, eliminating two notes and mortgages of Frank E. Johnson which had been paid prior to that time but were still held by the bank. The Ericson note of $1,000 was allowed to Luther College by the court in the bank receivership proceedings; but it has not been paid, and no part of the $5,000 so withdrawn by this last transaction was ever returned to the account of Luther College.

On March 2, 1927, appellant Benson, as treasurer of Luther College, loaned to one Olson, from the college funds held by him, the sum of $6,500, secured by note and mortgage of Olson. The note and mortgage were not taken in the name of Luther College, but were taken in the name of the Citizens State Bank of Wahoo, and by it later sold to Augustana Pension Fund of Des Moines, Iowa, receiving therefor $6,716.65, which money was deposited to the collection account of the Citizens State Bank of Wahoo. Later $6,500 of that amount was withdrawn from said collection account and credited to bills receivable account; and the balance, $216.65, withdrawn from the collection account and deposited to special account in the bank in the name of Central Bridge & Construction Company, but which was not in fact an account of that company. None of the money involved in this transaction, that is, neither the principal sum of $6,500, nor the $216.65 interest, was ever returned to the account of Luther College.

All of the foregoing transactions were handled exclusively by Emil Benson; the original entries on the records of the bank being made by him.

The foregoing summary is necessarily much condensed, but reflects the conclusions fairly drawn from the evidence.

It is contended that the evidence shows that the funds of Luther College were lost through the manipulations of the officers of the Citizens State Bank of Wahoo, and that it fails to show that Emil Benson, as treasurer of Luther

College, was guilty of embezzlement. The funds involved were deposited in the name of Benson as treasurer of the several different funds of Luther College. They were withdrawn by him as such treasurer of the respective funds and the misappropriations made by him in the first instance, though the bank, rather than Benson, individually may have been financially benefited by the transaction. Yet, he being the owner of a majority of the stock in that bank, it cannot be consistently contended that he received no financial advantage. It would be immaterial, under the terms of the bond, whether Benson as treasurer was alone guilty of the acts complained of, or whether they were consummated through connivance with others.

"Embezzle" and "convert to his own use" are synonymous terms. "Conversion to his own use" would be accomplished by any unauthorized act of dominion or ownership exercised by one person over property of another. *Colley v. Chicago & N. W. R. Co.*, 107 Neb. 864; *Nelson v. State*, 86 Neb. 856; *Chaplin v. Lee*, 18 Neb. 440. However, it is not essential to a recovery upon the bond involved that the plaintiff establish facts which would amount to a crime under the statute.

In a suit on a fidelity bond insuring an employer against loss sustained by any act or acts of embezzlement on the part of the employee, directly or through connivance with others, the word "embezzlement" is to be construed broadly in its general and popular sense, rather than in a narrow and technical spirit with reference to the criminal statutes of the state. *Mitchell Grain & Supply Co. v. Maryland Casualty Co.*, 108 Kan. 379, 16 A. L. R. 1488; *Genesee Wesleyan Seminary v. United States Fidelity & Guaranty Co.*, 247 N. Y. 52, 56 A. L. R. 964; *Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co.*, 115 Ky. 863, 103 Am. St. Rep. 356; *Fidelity & Deposit Co. v. Colorado Ice & Storage Co.*, 45 Colo. 443; *Dexter Horton Nat. Bank v. United States Fidelity & Guaranty Co.*, 149 Wash. 343; *Docking v. National Surety*

Co., 122 Kan. 235; *Fidelity & Deposit Co. v. Central State Bank*, 12 S. W. (2d) (Tex. Civ. App.) 611; *Rankin v. United States Fidelity & Guaranty Co.*, 86 Ohio St. 267.

The bond involved in this suit further provides: "That in the event that the loss exceeds the amount of this suretyship, the employer and the surety shall share with each other *pro rata* in any net recovery * * * in the proportion that the amount of the payment under this suretyship bears to the total shortage." The appellants urge that, even if the surety company is liable on its bond, it should be credited with the $9,508, plus interest, which is alleged to be one-half of the amount collected by Luther College since the failure of the Citizens State Bank.

It seems that in the bank receivership proceedings the court awarded to Luther College certain property, consisting of notes, securities and trust funds, and also that the college was allowed and received dividends on deposits belonging to it in said bank. These were not, however, items collected from appellant Benson, but were items of property in the possession or control of the bank which the court found belonged to the college, and were not part of the funds found to have been embezzled or converted by Emil Benson. The surety company, in any event, under the contract, would only be entitled to share in any net recovery from Benson or his estate. Further, the provision of the bond upon which appellants rely entitles the surety company to share in any net recovery only after it has made payment of the amount for which it is found liable. Until payment has been made, it has not, under the terms of its bond, borne any loss. Having made no payment, it is not entitled to share in any recovery. *Belgium State Bank v. Maryland Casualty Co.*, 177 Wis. 1; *Citizens Bank v. Fidelity & Deposit Co.*, 156 Ga. 581.

Finally, it is urged that the court erred in failing to designate, on rendering judgment, which of the defendants was principal and which surety, as required by the provisions of section 20-1544, Comp. St. 1929. Appellants cite *Blaco v. State*, 58 Neb. 557, a suit upon an official

bond of a public officer, and *Escritt v. Michaelson*, 73 Neb. 634, a suit upon a supersedeas bond. We do not consider that either of these control in this case. The contract involved in this action, while in form is a bond of indemnity, it is well established that the guaranteeing of the fidelity of employees and persons holding positions of trust is a form of insurance, and that such contracts are subject to the rules applicable to insurance contracts generally, and not rules applied to ordinary sureties for accommodation. Comp. St. 1929, sec. 44-401 (4); 25 C. J. 1089; 63 A. L. R. 728 (m); *First Nat. Bank v. United States Fidelity & Guaranty Co.*, 150 Wis. 601; *American Indemnity Co. v. W. C. Munn Co.*, 278 S. W. (Tex. Civ. App.) 956; *Southern Surety Co. v. Austin*, 2 S. W. (2d) (Tex. Civ. App.) 1000; *Employers Liability Assurance Corporation v. Citizens Nat. Bank*, 85 Ind. App. 169.

We conclude that the provisions of section 20-1544, Comp. St. 1929, are not applicable to the contract sued on in this case, and that the court committed no error in failing to follow the provisions of that section on entering the judgment involved herein.

After careful examination of the record, finding and judgment of the trial court found to be sustained by the evidence and affirmed. The appellee is allowed an attorneys' fee for services in this court in the sum of $300.

AFFIRMED.

FANNIE HOBBS ET AL., TRUSTEES, APPELLEES, V. BOARD OF EDUCATION OF NORTHERN BAPTIST CONVENTION ET AL., APPELLANTS.

FILED MARCH 16, 1934. No. 28721.

1. **Charities.** Donations to the endowment fund of a college, conditioned that the principal sum shall be "invested and preserved inviolable as endowment for said college," constitute a charitable trust.
2. ———. The fact that such donations are made direct to the

college without the intervention of a trustee will not defeat the trust and invest the college with absolute title to the fund.

3. ———. Donations to the endowment fund of a college for special purposes, such as "Declamatory Prize Fund," "Memorial Fund," "Scholarship Fund," and the like, become a part of the charitable trust.

4. ———. Donations to an endowment fund conditioned upon payment of annuities to the donors are a part of the trust.

5. ———. Securities and cash withdrawn from the endowment fund and used for the erection of a building and for general expenses of the college, or for the partial payment of a mechanic's lien, are converted into the general assets, and may not be restored to the fund to the prejudice of creditors, the college corporation being insolvent.

6. ———. Certain securities and funds contributed from the general assets of a college for the establishment of a "Library Fund," and placed in the endowment fund, will not be considered a part of the charitable trust to the prejudice of creditors.

7. ———. Donations to a college without other condition than that they shall be used for the purpose of erecting buildings and maintaining a college for education of the young do not constitute a trust, but are at most gifts upon condition.

8. **Trusts.** Whether or not a trust is created depends upon the language of the instrument under which the donation is made, the intention of the donor gleaned from the words used, and the purpose sought to be accomplished.

9. **Charities.** Charitable trusts are special favorites of courts of equity which will preserve and enforce them if possible under the rules of law.

10. ———. Where a denominational college became insolvent and closed its doors possessed of endowment funds constituting a charitable trust, it is within the judicial power of a court of equity to appoint a proper trustee for the preservation of the fund and administration of the trust, or to approve or authorize the transfer of the fund to an institution of the same general character and the same denomination; and in the selection of the trustee or institution, the consent of the donors, though not controlling, will be given great weight. The exercise of such power is purely judicial, and not dependent upon the doctrine of common law or judicial *cy pres*.

11. **Colleges and Universities.** All property of an educational corporation, to which it has unconditional title for the purposes of the corporation, is liable for its debts to the same extent as the property of an individual or other corporation is liable,

and in a proper case its property may be subject to mechanics' liens.

12. Trusts. The trustees of a charitable trust who have converted or misapplied a portion of the trust funds are not thereby estopped from claiming the trust character of the remainder.

13. ———. Where reasonable doubt exists as to the proper administration of a charitable trust, the trustees thereof have a right to apply to a court of equity for instructions with reference thereto, and their expenses for costs and attorneys' fees are properly chargeable to the trust estate.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS and RALPH R. HORTH, JUDGES. *Reversed, with directions.*

C. C. Caldwell and *H. G. Wellensiek,* for appellants.

A. G. Abbott, E. L. Mahlin, Paul B. Newell, Cleary, Suhr & Davis, Edward F. Hannon, Harry S. Grimminger and *Herbert F. Mayer, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CARTER and REDICK, District Judges.

REDICK, District Judge.

This action in equity is brought by Fannie Hobbs and others constituting the board of trustees of Grand Island College, a corporation, for the purpose of obtaining instructions from the district court for Hall county as to the proper disposal of certain funds now in their possession, and called and alleged to be "endowment funds" of said college. These funds came to the plaintiffs under certain contracts, pledges and agreements hereinafter more particularly described and were kept separate from the general funds of the college under the name of a so-called endowment treasurer and subject to the control of certain of the trustees appointed as an endowment committee by the board. The college was organized in 1892 and functioned as an educational institution until September 1, 1931, at which date its financial condition was such that it was unable to continue its operations and the col-

lege was closed, with a large indebtedness staring it in the face, consisting of a mechanic's lien, a number of judgments and numerous other creditors. The college was organized and sponsored under the auspices of the Baptist denomination and the subscriptions and payments to the "endowment fund" were almost entirely received from organizations and individuals of that denomination.

In anticipation of the final catastrophe toward which the college was tending, on May 6, 1931, the college entered into a written contract with the Sioux Falls University of Sioux Falls, South Dakota, an educational institution operated and endowed under the auspices of the Baptist denomination, for the consolidation and merger of said college and university, such merged institution to be organized under the name of the Sioux Falls College and to be operated at said city of Sioux Falls. Both colleges are under the jurisdiction of the Northern Baptist Convention, the supreme governing body over the educational institutions of the Baptist denomination in Nebraska, South Dakota, and other states. At the time of closing, the college owned property of the value stated to be $249,500, consisting principally of the campus and college buildings, which is alleged to be unmarketable and incapable of being sold for an amount sufficient to pay its indebtedness; also, certain real estate and securities alleged to constitute a general endowment fund; also a number of other securities alleged to constitute annuity, scholarship, memorial and other special funds to which reference will be made hereafter.

The prayer of the petition is for the judgment, direction and advice of the court as to the administration of their trust and their duties in connection therewith, for a decree finding whether the funds or properties in their control, or any part thereof, are subject to the payment of the indebtedness of the college, and, if so, determining the priorities, if any, as between such creditors, determining the rights and equities, if any, of the several donors and contributors to said endowment fund and the holders of

agreements for the payment of annuities, a decree approving and confirming the contract between Grand Island College and Sioux Falls University and appointing trustees as successors of plaintiffs of the endowment funds and properties of the college, and for an order allowing payment of plaintiffs' attorneys for legal services in this action. Other matters with respect of which relief is prayed will be referred to later.

The defendants may be divided into five general groups:

(1) The board of education of Northern Baptist Convention, successor to American Baptist Education Society, which contributed, at various times, the sum of $21,275 to the "endowment fund," and which claims that the said endowment fund constitutes a charitable trust and consents that the same may be transferred to Sioux Falls College.

(2) Contributors to said endowment fund subject to payment of certain annuities during the life of the contributor, to wit: Lauretta J. Schreiner, $26,500; Frank J. Pierce, $1,000; Eva H. Coon, lots in Grand Island said to be worth $1,500; Minnie A. Tavender, $500; A. D. Turnbull, $3,100; Jefferson D. Yelton, $2,000.

(3) Other contributors to the endowment fund without special conditions: John R. Webster, $5,000; and a large number of contributors of various amounts which are not divulged in the evidence.

(4) Amounts contributed as memorials or for scholarships: Victor Person, $2,000; Philip Kinney, $500; and four unpaid notes—Mildred E. Person, $2,500; George E. Warren, $2,000; Alice J. Roessler, $100; Gertrude Martin, $500.

(5) Persons holding judgments against the college, to wit: Grand Island Plumbing Company, mechanic's lien in decree; Chicago Lumber Company, Harry Grimminger, and city of Grand Island, and numerous other creditors who are not named as parties.

Nearly all of the contributors to the endowment, special funds and annuities above named and a number of others have joined in the prayer of the petition or filed consent

that what remains in said funds may be transferred to Sioux Falls College. Answers were filed by a number of the defendants, but it will not be necessary to set them out at this point; suffice it to say that they raise the following questions: (1) Are the general endowment funds, or any of the annuity or special funds, subject to the claims of creditors? (2) What priorities, if any, exist between creditors? (3) What disposition shall be made of funds, if any, which are not subject to the claims of creditors? It is conceded that all the property, real and personal, except that in the funds mentioned is subject to creditors.

Proper replies were filed and the case submitted to the district court, which rendered its decree finding generally against the plaintiffs, and finding (1) that the contract between Grand Island College and Sioux Falls College was void; (2) that the endowment funds did not constitute a charitable trust and were subject to the claims of creditors; (3) that the funds held under certain annuity contracts, the Patterson, Pierce, Tavender, Turnbull, Yelton, and Coon, were held in trust and charged with certain payments to be made to the beneficiaries; (4) that the Schreiner annuity fund was held in trust under a valid contract, and that the applicable securities in the sum of $15,000 be placed in the Stevens National Bank of Fremont, Nebraska, for safe-keeping and to secure the unpaid instalments under said contract, any surplus to be converted into the college assets, free from any trust for the maintenance of a chair of English Bible; (5) that the claims of judgment and other creditors are valid against the college except a claim of Grand Island College by assignment of one-half of the mechanic's lien of the Grand Island Plumbing Company; (6) that the said mechanic's lien is a first lien against the property covered thereby.

Decree was rendered in accordance with the findings and the receivers theretofore appointed by the court were ordered to convert all of the assets of the college, except those charged with the payment of annuities, into cash,

and to pay (1) an attorney's fee of $500 to plaintiffs' attorney, (2) balance remaining due upon the mechanic's lien, and (3) distribute the remainder among the other creditors *pro rata*. Motions for a new trial were filed and overruled, and the board of education of the Northern Baptist Convention, Sioux Falls University, and Sioux Falls College, all corporations, bring the case here on appeal. The city of Grand Island for itself and all other unsecured creditors of Grand Island College files a cross-appeal.

During the existence of the college as an educational institution numerous donations and contributions were made to the college for the purpose of establishing an endowment fund, in the aggregate about $85,000, of which there remained in the hands of the so-called "treasurer of the endowment fund" $52,400 at the time the college was closed, the remainder having been borrowed by the college for the erection of buildings to the amount of $26,726.41, and some used by the college as collateral security for loans, generally with the consent of the donors.

The first question presented for our determination is whether or not the moneys and securities remaining in the endowment fund constitute a charitable trust, or whether full ownership rests in the college and therefore subject to claims of its creditors.

Article 10 of the articles of incorporation of Grand Island College is as follows: "The board of trustees shall have full power and authority to carry into effect the purposes of this incorporation; shall have the general care and disposal of the funds and property of the corporation for the benefit of the college and may use and invest said property and funds in such a way and manner as may to them seem most effective subject, however, to the laws of this state and the conditions and purposes of special endowments, bequests and donations."

The endowment fund was initiated June 23, 1892, by a gift from "The American Baptist Education Society" under a written proposal in the following terms: "Will con-

tribute to Grand Island College located at Grand Island in the state of Nebraska for the purpose of endowment for said institution, and to be invested and preserved inviolable as such, the sum of $5,000 less 5 per cent. to be retained by this society to defray expenses;" upon condition that the college raise $15,250 in cash or good pledges, not less than $5,000 thereof to be "set apart inviolably as endowment for said college." On November 27, 1899, the society made a further gift under like terms and conditions of $10,000, provided a supplementary sum not less than $25,500 shall be contributed to said college, and "provided, that the whole of said supplemental sum, less expenses incident to the undertaking, shall be set apart and inviolably kept as an endowment fund for the college." These gifts were accepted by the college and the supplemental amounts raised under subscriptions substantially in the following language: "Whereas, the American Baptist Education Society has offered to give the sum of $7,500 towards the endowment fund of Grand Island College, Grand Island, Nebraska, on condition that the further sum of $17,875 is subscribed on or before June 1, 1897. Now, therefore, for the purpose of raising said sum," I promise to pay, etc.; or in the following form: "Whereas, Grand Island College, Grand Island, Nebraska, needs a permanent endowment of $100,000 to enable the trustees to meet the current expenses of the institution on its present economical basis of expenditure and whereas, $35,000 of that sum has already been secured, and whereas, the American Baptist Education Society has given a pledge of $10,000, the same to be binding when Grand Island College shall have secured $25,000 additional: Now therefore to secure the aforementioned pledge and to aid in providing a sufficient endowment," I promise to pay, etc.

The funds donated by the education society $21,275, Mr. Hanson $9,500, as well as all collections made from contributions secured under the pledges above quoted were delivered to the treasurer of the endowment fund of the col-

lege and deposited in the bank under his official designation, and have always been kept separate and distinct from the general funds of the college, which were under the control of the college treasurer. The principal of the endowment fund, with the exceptions heretofore noted, was kept intact and only the interest thereon used for general college purposes. A separate treasurer was elected by the trustees to have charge of the fund under the direction of a committee, called the endowment committee, elected by the board of trustees of the college from their number.

Under these circumstances and conditions the question recurs: Does this endowment fund constitute a charitable trust? If so, it is not subject to the claims of creditors, and, if not, it belongs to the general assets of the college. Charitable trusts do not differ from numerous other kinds of trusts, except that they are generally affected by a public interest and are looked upon with peculiar favor, it being the policy of the law to sustain them if possible. At common law a trust in the nature of a public charity was looked upon with such favor that it was not permitted to fail even by reason of the impossibility of carrying it out according to the conditions prescribed by the donor; but in such case, and to meet such contingency, there arose the doctrine of *cy pres*, in accordance with which the subject-matter of the trust came under the protection of the King as *parens patriæ*, whose duty and prerogative it was to administer the trust, as nearly as might be, in accordance with the declared wishes of the donor. This doctrine was not generally adopted as a part of the common law in this country, and was never a part of the jurisdiction of nor, until statute 43 Elizabeth, enforced by the court of chancery in England unless in aid of the King's prerogative. In some states, by statute, the prerogative of the King has been conferred upon the legislature, but not in Nebraska. *St. James Orphan Asylum v. Shelby*, 60 Neb. 796. This subject will be further discussed later.

Whether or not an instrument creates a trust or passes full title depends, of course, upon the language of the in-

strument and the intention of the grantor as indicated by the terms he has used; and if such intention is clearly expressed it is the duty of courts to construe the instrument in accordance therewith. It seems perfectly clear to us that the intention of the Baptist Education Society was to create a fund which should not be subject to the exigencies or peril of mismanagement of the institution to which it was given, or subject to the control of its trustees, except for purposes of investment, the interest or income from which alone was to be subject to such control. That the intention of the donor was to create a trust as to the principal of said fund seems to us an incontrovertible proposition. The terms are clear and explicit that the fund is to be preserved inviolate, and the subsequent contributions to the fund were made with special reference to the original donations of the education society.

The intention of the donors to establish a charitable trust having been determined, it remains to determine whether or not they have complied with the requirements of the law governing the creation of such a trust. The contention of the creditor appellees is stated in their brief in the following language:

"No trust is created where property is conveyed or donated to a charitable corporation, although the donor adds that it is to be used for certain purposes, when those purposes are among those for which the charitable corporation was incorporated. One cannot be a trustee of property and a beneficiary at the same time and the legal and equitable title is in the college where gifts are made directly to it."

In support of that proposition they cite a number of cases, some of which will be examined and considered. *Woman's Foreign Missionary Society v. Mitchell,* 93 Md. 199, involved the construction of the following clause in a will: "I direct that my two houses and lots in Mountain Lake Park, Garrett county, Maryland, and my lots in Covington, Kentucky, and the stock in the Southern Building Association held in care of W. G. Hay, of Hagerstown,

Maryland, and all other property, both real and personal, other than that already bequeathed, be sold, and the proceeds thereof, together with whatever moneys I may die possessed, be held in trust by the board of managers of the Foreign Missionary Society of the Methodist Episcopal Church of the United States of America for the following purposes: After all my debts, bequests and provision for my burial, etc., be paid, that sufficient be used to educate as Bible readers in India six girls, one to be named 'Dorcas Sherman;' one 'Avis Cecil Sherman;' one 'Mary Jane Sherman;' one 'Sarah Jennie Sherman;' one 'Jennie Smith;' one 'Grace Mabel Sherman;' the money remaining after that set aside for the education of the aforesaid Bible readers to be applied to the purchase of a building to be used for the education of girls in India to be called the 'M. Adelaide Sherman Home,' and the location of said building to be left to the decision of Bishop Thoburn or his successors." And it was held that the testatrix did not intend to create a trust by the mention of the purpose for which the funds bequeathed were to be used, "because the education of girls in India as Bible readers is the purpose to which the money given would have been applied under the charter of the corporation, and that the words relating to the use of the legacy operate at the most as a condition affecting the expenditure and not to the vesting of the legacy." The result from this holding was that the missionary society became the absolute owner of the fund for the general purposes for which it was organized. The validity of the residuary clause was assailed on the ground that it created a trust whose objects were indefinite and uncertain, the question being raised by the collateral kindred of the decedent. It will be noted that the fund was granted absolutely to the missionary society, the corpus thereof to be expended by it for certain purposes, and it was not contended that the fund had been or was about to be misapplied.

Clarke v. Sisters of Society of the Holy Child Jesus, 82 Neb. 85, was where real estate was conveyed to the society

in fee simple, the deed containing the following: "One of the conditions upon which this property is conveyed is that the grantee herein hereby agrees to teach the parochial school children (whose parents are known to be unable to pay) free of charge, and if the grantee herein should fail to use the said property for convent school purposes, or refuse to teach the parochial school children as agreed above, or shall divert said property to any other use, then the said property herein conveyed shall revert to and be the property of the grantor, if living, and, if dead, to his heirs." The school was established and maintained for about 23 years until 1907, when the grantee abandoned the property, declined to maintain a school upon the same in the future, and conveyed the premises to the heirs of John Fitzgerald, deceased, the original grantor. However, in 1888 the grantor and grantee entered into a contract modifying the terms of the original deed, providing that, "if the property described in said deed shall ever, in the judgment of the grantors or grantees, become inadequate or unsuited for the purposes for which the said property is deeded, then the grantees shall have power and authority to sell, pass title and execute deeds of conveyance thereto, upon condition, however, that the proceeds arising from said sale shall be reinvested in other property, which shall be used for the purposes known in said deed of conveyance." After reentry by the heirs of Fitzgerald an action was brought by certain persons belonging to the class specified in the deed (parochial school children whose parents are known to be unable to pay) claiming that the original conveyance created a charitable trust for their benefit and praying that the deed to the heirs of Fitzgerald be canceled. The court held that no trust was created and used the following language: "The general rule appears to be that, where property is conveyed directly to a corporation to hold for purposes for which the corporation was created, no trust for the benefit of others arises. There are no apt words in the deed to create a trust, or making the grantee a trustee of the property. On the

contrary, it is evident that the grantor intended to vest the legal title absolutely in the corporation for use in its corporate business, subject to the conditions named. * * * The property was to be used in the business of the corporation for its own purpose and for its own benefit." The court cited *Bennett v. Baltimore Humane Impartial Society*, 91 Md. 10; *Woman's Foreign Missionary Society v. Mitchell, supra; Erwin v. Hurd*, 13 Abb. N. C. (N. Y.) 91; *Bird v. Merklee*, 144 N. Y. 544; and *Wetmore v. Parker*, 52 N. Y. 450, from which latter case it quotes the following language: "It does not create a trust in any such sense, as that term is applied to property. The corporation uses the property, in accordance with the law of its creation, for its own purposes; and the dictation of the manner of its use, within the law, by the donor, does not affect its ownership or make it a trustee. A person may transform himself into a trustee for another, but he cannot be a trustee for himself." The *Clarke* case and all those cited in its support were cases in which an absolute transfer of the property was made by the donor to be used for the general purposes of the donee, subject only to certain conditions prescribed by the instrument of gift.

Whitmore v. Church of the Holy Cross, 121 Me. 391. That case involved the construction of two clauses of a will, one devising to the First Congregational Parish of Gardiner, Maine, a house and lot "as a parsonage" and the other bequeathing to the parish the sum of $1,000 "to be held and invested by trustees to be selected by the parish, the income of the same to be used as far as necessary in keeping said homestead and lot given as a parsonage in repair, also I give and bequeath to said First Congregational Parish the further sum of $2,000 to be held and invested by trustees selected by the parish, the income of the same to be used for the maintenance of singing in the church occupied by said parish." In holding that no trust was created either in the real or personal estate the court said: "It is apparent from the language used that no trust was intended to be created by the testator. It is

true she did indicate in terms that the money given was 'to be held and invested by trustees to be selected by the parish,' but such declaration is not sufficient standing alone to establish a trust. It is simply a direction that the money should be in charge of the trustees to be chosen by the parish, the method employed universally in church management, and a custom well known to the testator." The ground of such holding was that a trust cannot exist where the same person possesses both legal estate and the beneficial interest—citing *Doan v. Ascension Parish,* 103 Md. 662, to the effect that if the legal and equitable interest happen to meet in the same person the equitable is forever merged in the legal. It will be noted with reference to the $2,000 bequest to be invested and the income used for maintaining singing in the church, the entire beneficial interest is in the parish which is both the supposed trustee and *cestui que trust;* while in the present case the real beneficiaries are the students of the college. There are, however, many exceptions to that rule, as where the interest of the parties requires that the legal and equitable estates be kept separate, in which cases equity will prevent a merger. To the proposition that "a college, which is a private corporation, capable of taking and holding property, has the *jus disponendi* as fully as natural persons," and that "gifts of money or property made to it directly, without the intervention of a third party as trustee, are subject to debts, where not exempted by any statute and where no conditions and limitations are expressly made, on breach of which the gift is to revert," the creditors cite *People v. President and Trustees of the College of California,* 38 Cal. 166, where the real property was purchased for value, and the "donations were absolute and unconditional;" also *Tash v. Ludden,* 88 Neb. 292, where subscriptions "were given and paid in the treasury of the corporation without any written condition, trust, purpose or obligation, except that the same were to be used for the purposes of the corporation in purchasing land, erecting buildings, putting them up and supplying

the school," and it was held that the gifts were absolute; also *Trustees v. Barren County Board,* 190 Ky. 565, where all donations, devises or bequests were "to be held by them (the trustees) for the use and benefit of an educational institution, and according to the intention of the donors," without other condition or limitation. The dispute was between the donors and the board as to the surplus remaining after payment of the debts of the college. The gifts were held to be absolute, and the board of education entitled to the surplus under a statute to that effect. The obvious distinction between those cases and the present one is that there the gifts were unconditional, while here the condition was imposed that the principal be kept inviolate and only the income used. A number of other cases are cited to the same effect and distinguishable for the same reason. Also to the point that "a gift to a corporation conditioned upon a use for which said corporation is incorporated makes such gift absolute and not a trust." Conceding this to be a correct statement of the law, it has no application here except perhaps as to the income.

We think that all these cases are distinguishable from the one under consideration by the fact that the absolute control of the corpus of the estate conveyed was transferred to the grantee, while here the body of the gifts and contributions were distinctly stated to be for the endowment of the college, the corpus to be kept intact and inviolable, and the income only to be used for the general purposes of the college. While the legal title or estate may be said to be in the college, it is not an absolute estate. The college is given no control over anything but the income arising therefrom. The college has no beneficial interest in the body of the gift, and the real beneficiaries of the trust are the students who may attend the college for the purpose of education. If the gifts in this case had been unconditionally to the college for the purpose of purchasing a site, building necessary buildings, and maintaining a school for the education of the young, doubtless the cases

cited would be applicable. But, as elsewhere intimated, the intent of the contributors to the endowment fund was clearly to preserve it from mistakes and mismanagement of the trustees, and to provide a permanent fund, the income of which should be used for educational purposes. This is in its very nature a charitable trust, and to put any other construction upon the instruments evidencing the donations would destroy and render nugatory the benevolent intentions of the donors.

While it is said in general terms that to create a trust requires the existence of a donor, a trustee, and a *cestui que trust,* there are many cases where charitable trusts have been declared and enforced, notwithstanding the fact that the trustee and the *cestui* may be the same entity, but where the estate has been received by the trustee under certain conditions or for certain purposes, on the ground that equity will require the conditions upon which the trustee received the estate be complied with. Among those cases we call attention to *Curtis & Barker v. Central University,* 188 Ia. 300. In that case about $52,000 was given to the university on the following condition: "The said sum to be a part of the permanent fund of the college to be known and designated as the Curtis and Barker fund shall be kept distinct from the other funds of the college, and the principal sum to be sacredly held and no part of it to be in any manner consumed by or for the use of the university and in no case shall it be liable for the debts, defaults, liabilities or obligations of the university nor of the donors, but shall be kept on interest well secured and the interest may be used for the benefit of the school." That was an action brought by the donors to recover the fund under a provision for reverter on the ground that the grantee, an institution under the sponsorship of the Baptist denomination, had turned over a portion of its property to the control of the Reformed Church in America and the remainder to the Baptist College in Des Moines, Iowa, the original grantee having been located at Pella, Iowa, and the plaintiffs were permitted to recover. After

saying "The donation clearly creates a trust, which required that the principal should be held intact, and the interest used. It was to be held as a permanent fund"—the court held against the contention of appellant that, where the trustee and *cestui que trust* are the same, the title merges, saying: "But it does not necessarily follow that, under all circumstances, the union of the two estates, even if there is such a union in this case, works a merger. If there is a reason for keeping the estates separate, or if it is necessary to do so to carry out the purposes and intentions of the donors, equity will prevent a merger. *Sherlock v. Thompson,* 167 Ia. 1. Here the instrument making the donation and stating the conditions thereof reserved in the donors an interest and created a trust for the benefit of the college and for their own benefit. To hold that there was a merger would nullify the purposes and intentions of the donors, and destroy the power to create conditions or a reversion."

Associate Alumni v. General Theological Seminary, 163 N. Y. 417, was a case where a sum was donated to the seminary for the establishment of a professorship on certain terms and conditions, and it was held that a charitable trust was created, and that an abuse of the trust or misapplication of the fund did not operate to destroy the trust and cause a reversion to the donor or his heirs, but that relief was to be found by application to a court of equity to enforce the trust.

In *Lupton v. Leander Clark College,* 187 N. W. 496 (194 Ia. 1008) a donation of $50,000 was made to the endowment fund of the college without the intervention of trustees to "constitute a permanent endowment fund, the principal of which shall be protected and forever held sacred as such," and it was held to establish a charitable trust for the aid and support of Christian education. It was further held that neither trustees of donor's estate nor residuary legatees had "such interest in the endowment fund that they could maintain action to enjoin a merger of the college with another and the transfer of the en-

dowment fund, unless there was a forfeiture or breach of the contract which resulted in the reversion of the fund donated to the estate of the donor." That "Donations to an endowment fund of a college for the promotion of education are gifts to charity." That it was the duty of the court to ascertain the true intention of the donor, and that "Charitable trusts will not be permitted to fail if the intention of the creator can be carried out and effect be given thereto."

In *Starr v. Morningside College,* 186 Ia. 790, the sum of $2,000 was willed to Charles City College to "be added to and made a part of the endowment fund of the said Charles City College located at Charles City, Iowa, and that the same be in no manner used or disposed of by them;" and while the court declined to enter into a discussion as to whether a trust was created, it held that the gift was not intended to be absolute but to further the cause of education and religion, and that there was no allegation that the principal fund had been or would be diverted and used for any other purpose.

In *In re Estate of Nilson,* 81 Neb. 809, it was held that bequests to certain churches, the income to be used for certain purposes, created a charitable trust, and that the doctrine of charitable uses as administered by the courts of chancery in England was in force in this state, but in its application the courts can exercise judicial powers only. It was further held that the courts will view with favor donations by will for charitable purposes and will endeavor to carry them into effect where the same can be done consistently with the rules of law.

It is true that in these cases the question generally arose between the donor or his heirs and the donee, but the question of the existence of the trust is not affected by that circumstance, and the conclusion must be the same, however, the question is presented, as it depends upon the terms of the donation, the conditions attached thereto and the object or purpose for which it is made.

We are of the opinion that the donations made by the

Baptist Education Society and others to the endowment fund of Grand Island College constituted a charitable trust, regardless of the fact that they were made direct to the college; and that the college did not acquire absolute title to the principal of such fund but only to the income thereof. We are further of the opinion that it was the intention of the donors to establish a public charity of a character which is within the special favor and superintendence of a court of equity to preserve it and to secure its application in accordance with the conditions under which it was received.

A number of contributions to the college were made under different contracts, and they will now be considered. The Patterson prize fund was created by the conveyance of land to the college to sell the same and use the proceeds "for the purpose of creating a Patterson Declamatory Prize Fund." The lands were sold and a fund of $800 resulted. There was a provision in the gift that the proceeds become a part of the endowment fund of the college and for a reversion to the grantor in case the college should cease to operate for two years. Beyond question this was a charitable gift to become void upon condition subsequent, upon the happening of which the fund would revert to the donor.

The "Victor Person memorial fund," so-called, is claimed to be a special endowment established by Victor's father as a memorial, but the evidence does not establish any contract or conditions to support this contention. We think, however, that a stipulation between the parties to the effect that this donation was made to the endowment fund is broad enough to bring it within the class of charitable trust. The I. W. Carpenter donation is also within the terms of the stipulation.

The "Library Fund" was created as follows: It appears that certain securities were set aside by the college trustees and placed in the control of the endowment treasurer for the maintenance of the library, but the evidence entirely fails to establish any gift or donation for

such purpose. We are, therefore, constrained to hold that the securities in this fund do not constitute a trust.

The "Philip Kinney Memorial," $500 in cash, was received by the college from the pastor of some church in Nebraska and was to be designated as the Philip Kinney Memorial. While the evidence upon this subject is far from satisfactory, we are of the opinion that this fund calls for protection as a charitable trust.

The John R. Webster fund, $5,000. This fund was initiated May 14, 1901, by a gift of $1,000 to "be held by said college forever, as a trust fund to be known as the 'Webster Scholarship' and no part of the principal of said sum shall ever be expended for any purpose whatever." The contract also provided that, if for any reason the college became incapable of administering the trust, the fund should be transferred to its successors or some other institution of learning to be selected by its trustees. The remainder of the fund is alleged in the petition to have been given to the college by Mr. Webster for several special purposes, and that "thereafter by consent of and with the agreement of said donor the said college duly passed a resolution that all of said fund of said $5,000 should be preserved intact and known as the John R. Webster endowment fund." We know of no rule whereby the college could set aside a portion of its general assets, call it an endowment fund and thus create a charitable trust. We therefore conclude that to the extent of $1,000 the Webster fund is a part of the endowment, but the remainder is a part of the general assets of the college.

The "Mildred E. Person Memorial" note, "Warren Scholarship" note, Alice J. Roessler note, and Gertrude Martin note appear to be a part of the endowment fund, although none of them have been paid.

The "Lauretta J. Schreiner Annuity," so-called, arose in the following manner: In 1919 certain lands were conveyed to the college to be sold and the proceeds placed in the hands of the Equitable Trust Company of Omaha "for investment as a part of inchoate endowment fund of said

college, and shall be perpetually held as a part of the endowment fund of said college and shall be known as the Lauretta J. Schreiner endowment fund." In consideration of such conveyance the college agreed to pay Lauretta J. Schreiner the sum of $33,600 in quarterly instalments of $420 each. Subsequently, the Equitable Trust Company having gone out of business and there being about $35,000 in the fund, by the consent of the college and Schreiner, the fund was turned over to the college subject to the payment of the annuity. The contract further provided that after the maturity of the annuity April 1, 1939, any balance remaining in the fund should be "applied toward the maintenance of a chair of English Bible in said Grand Island College and shall never be used for any other purpose." Still later an agreement was entered into whereby all of the securities in the fund in excess of $15,000 should be released to the college for the purpose of collateral security for a loan, and the $15,000 was turned over to the Stephen's National Bank of Fremont as trustee to secure the payment of the annuity, the college engaging to restore to the fund the securities borrowed. The annuity has been kept up to date, but the securities are still held as collateral. We think it was the intention of the parties to create a charitable trust by the establishment of this fund and the same should be protected to the extent of $15,000, and any surplus arising from sale of the collateral to be applied as directed.

The A. D. Turnbull, Minnie A. Tavender, Jefferson D. Yelton, Frank J. Pierce and Eva H. Coon donations were shown by the evidence to have been contributed under contracts which did not provide that they should be a part of the endowment fund, but the petition alleges that they were so contributed and the stipulation above referred to seems to admit that fact and they have always been so considered. The terms of the stipulation are: "That contributions have been made to Grand Island College and to its endowment fund, as alleged in paragraph 10 of the plaintiffs' petition with provision for the pay-

ment to the donors of annuities substantially as alleged in paragraph 10," which included those mentioned. While counsel for the creditors did not join in this stipulation in its entirety, the only evidence they required was, where "these special donations were given by will or written instrument that those ought to be offered in evidence so that the whole instrument will appear," which was done. Under these conditions we think the stipulation was complied with, and that the fact that the contributions were made to the endowment fund must be deemed established.

Claim of Grand Island College to reimburse the endowment fund the sum of $26,726.41 which it withdrew from said fund many years ago with which to build a girls' dormitory. This cannot be allowed. When these funds were withdrawn they were converted into property which cannot be separated from the general assets of the college to the prejudice of creditors. The same is true of quite a number of other misapplications of the fund. If there is any remedy for these acts it lies with the successor in trust or the donors against the college trustees.

We hold that the following funds and property held by Grand Island College trustees constitute a charitable trust and are not subject to the claims of creditors:

(1) The securities listed in exhibit 3 at page 86 of the bill of exceptions to the amount of $46,900; excluding only claim of the college to one-half of the mechanic's lien of Grand Island Plumbing Company. The item of $5,500 in this list, which is disallowed as part of the fund, is a claim by the college on account of payment of one-half of the mechanic's lien of the Grand Island Plumbing Company. This payment was enabled to be made through payment of the Gibson loan which was a part of the endowment fund, but the evidence does not identify it with any particular gift to that fund. Our attention has not been called to any rule of law which would authorize this court to withdraw from the general assets a sum to reimburse the endowment fund under these circumstances, and as between the creditors and the college, the former

have the stronger equity. (2) All real estate to which the college holds legal or equitable title as the result of the foreclosure of mortgages which formed a part of the endowment fund of the college. (3) The securities in the Weaver fund, now in custody of United States National Bank as executor and trustee. (4) The Philip Kinney Memorial fund $500. (5) John R. Webster scholarship fund $1,000. (6) The notes of Mildred E. Person, $2,500; George E. Warren, $2,000; Alice J. Roessler, $100; estate of Gertrude Martin, $500. (7) Patterson prize fund $800. (8) The A. D. Turnbull, Minnie A. Tavender, Jefferson D. Yelton, Frank J. Pierce and Eva H. Coon donations. (9) Lauretta J. Schreiner annuity to the extent of $15,000 and any surplus remaining after payment of the notes for which securities were pledged as collateral security. (10) James H. Davis donation $300. (11) Friend Baptist Church donation $500. (12) Victor Person memorial fund $2,000. (13) Mildred E. Person endowment fund $2,500 note. (14) George E. Warren scholarship fund $2,000 note. (15) The I. W. Carpenter lands.

With reference to the following items we hold that the evidence is insufficient to establish a trust and the securities held in connection with any of them are not held as a part of the endowment fund but belong to the general assets: C. M. Strong, Library fund, $4,000; Y. W. C. A. fund, $87.80; Missionary school fund, $51.33; R. M. Proudfit, $800; Grand Island College claim for $26,726.41 borrowed from endowment fund for the erection of buildings.

We will now briefly discuss the powers of a court of equity with reference to this charitable trust, the existence of which has been established. As has been heretofore stated, the common-law doctrine of *cy pres* and the statute 43 Elizabeth are not in force in this state, and the courts are restricted to the exercise of judicial powers only. Charitable trusts, however, were administered by courts of chancery of England exercising their inherent judicial powers anterior to and independent of the statute 43 Elizabeth. *Vidal v. Girard's Executors*, 2 How. (U. S.)

127. And by the Constitution of this state courts of equity are invested with all the jurisdiction of the chancery courts of England as it existed at the time of the separation from that country, including the doctrine of charitable uses. *In re Estate of Nilson,* 81 Neb. 809. The power thus exercised is purely judicial. Equity does not itself administer the trust, but acts through trustees appointed by the donor, or, in case of failure thereof, will appoint a trustee. The exercise of this power over charitable trusts has been attributed to what has been termed the judicial *cy pres* doctrine. *Richards v. Wilson,* 185 Ind. 335, 386; *In re Estate of Nilson,* 81 Neb. 809, 817, citing *Crerar v. Williams,* 145 Ill. 625. This judicial power will not be exercised to the full extent of the prerogative power; that is, to devote the fund to a different purpose than the donor intended but one as near like it as possible; but, it will be exercised to preserve the fund if possible and devote it to the general charitable purpose of the donor. Charitable trusts "are construed so as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifest, even if the particular form and manner pointed out by him cannot be followed. * * * So the principles of construction applied to public charities evolved the judicial *cy pres* doctrine, and under its application in circumstances like those here, the courts are required to look beyond the institution, or trustee, particularly designated to administer the property given and the particular manner in which it is to be administered, to those for whose benefit it is to be administered. And if it appears that the latter were the real objects of the donor's bounty, the trust will survive the failure of the particular trustee and the particular method of administering the trust if the court can secure a trustee to carry into effect as near as may be the dominant purpose of the donor. And so in many cases it has been held that, notwithstanding the corporation to which the gift was to go and by whom it was to be administered was not incorporated, or would not or

could not administer the trust, nevertheless, the trust did not fail, but only the machinery for carrying it into effect, and that in such cases the court would supply not only the trustee but devise a mode of administration akin to that intended." *Richards v. Wilson,* 185 Ind. 335, 393, 394, citing cases from numerous jurisdictions. We will not extend this opinion further upon the *cy pres* doctrine, as we are of opinion that recourse thereto is not required for the disposition of the case, which can be accomplished by the exercise of the ordinary and conceded judicial powers of the court.

The Grand Island College has entered into a contract with Sioux Falls College of Sioux Falls, South Dakota, whereby it seeks to transfer to the latter the endowment funds, and any surplus, after paying its debts, of all its property. Can it lawfully do this, and has the court the power to approve and authorize such a transaction? The Sioux Falls College is of the same general character as the Grand Island College. It is under the sponsorship of the same Baptist denomination, and control of the Northern Baptist Convention. It has agreed to accept the fund subject to all the conditions of the donors, as to memorials, special funds and annuities, and to administer the trust accordingly. The Northern Baptist Convention, the principal and all known donors consent to the transfer. There is no other institution prepared to take over the execution of the trust.

It is entirely probable that, unless the trust can be executed, the funds would revert to the donors (*People v. Braucher,* 258 Ill. 604; *Miller v. Riddle,* 227 Ill. 53) by far the greater number of whom are unknown. The fact that all known donors have consented to the transfer, though not controlling, is a matter to be given great weight. It is for the purpose of carrying out the benevolent intentions of the donors that the intervention of a court of equity is invoked.

It is insisted by the creditors that one of the conditions of the gifts to the endowment fund was that the college

be maintained at Grand Island. We cannot agree. We think the dominating intention of the donors was much broader, and was the creation of a charitable trust for educational purposes, and that the location of the college was a matter of description or identification. However, the creditors are not in a position to raise the question in view of our holding.

A transfer such as is proposed was approved in *Lupton v. Leander Clark College,* 194 Ia. 1008, and *Starr v. Morningside College,* 186 Ia. 790. We see no legal or other objection to the proposed transfer. If it were set aside, it would be the duty of the court to appoint a trustee to administer the trust, and whom could it appoint? If not the appellant, there being no other party willing to undertake it so far as the evidence in this case shows, it would be necessary to distribute the fund to the donors *pro rata,* which is a practical impossibility; or, it is probable, in view of the consents filed by the donors, if distribution could be made, the fund would eventually find its final resting place with the Sioux Falls College. Why require such circumlocution when the same result may be accomplished directly in the manner proposed? By approving the transfer the court merely confirms the selection of a new trustee, one of its conceded judicial powers in this class of cases, and secures the application of the fund to the uses and purposes intended by the donors. We therefore hold that the contract is *intra vires* of the Grand Island College, approve the same and direct that it be carried out.

A number of other matters presented by the record will now be considered. First, whether the property of the college, other than the endowment funds, is liable for the debts of the college. There is no real contest here. The agreement of the two colleges provides for the sale of all property of Grand Island College for payment of creditors, excepting only such portion thereof as may be determined not liable therefor. It seems well settled that where donations are made for the general purpose of

carrying on a business of any kind, though in the form of a trust, the absolute control of the *res* being bestowed upon the donee, the property is liable for debts incurred for the purpose intended. *Woddrop v. Weed,* 154 Pa. St. 307; *Norton v. Phelps,* 54 Miss. 467; *McLeod v. Central Normal School,* 152 Pa. St. 575. Section 24-701, Comp. St. 1929, providing for the incorporation of educational institutions, provides that they "may hold all kinds of estate, real, personal, or mixed, which they may acquire by purchase, donation, devise, or otherwise, necessary to accomplish the objects of the corporation, and the same to dispose of and convey at pleasure." Of course, the disposition of the property must be one in conformity with the purposes for which it is held; but debts incurred in carrying out such purposes are for the benefit of the corporation, and fully within its powers to contract, which carries an obligation to pay.

We have not overlooked the provision of the charter of the college that "The Board of Trustees shall never in any manner sell, convey, alien or mortgage, or in any manner pledge the campus and college buildings or the premises whereon the same may be situated." But by a previous article the trustees were given "full power and authority to carry into effect the purposes of this incorporation," which were the establishment and maintenance of a college. It must have been within the contemplation of the incorporators that debts would be incurred in the accomplishment of such purposes, and that liability for payment thereof is not within the terms or spirit of the above prohibition.

It was held in *Ray County Savings Bank v. Cramer,* 54 Mo. App. 587, that a college building erected and maintained by a religious society may be subjected to a mechanic's lien. A distinction must be taken between a private and a public corporation, a private and a public charity. Schools and other institutions owned and operated by the state are not subject to such lien. Much reliance is placed upon *Horton v. Tabitha Home,* 95 Neb.

491. Defendant was organized for charitable religious purposes to provide a home for aged persons and orphans, a "general charity." It was held to be a religious society and could not subject its property to a mechanic's lien without permission of the district court of the proper county, under a statute to that effect. It was further held that the contract under which the improvements were made was *ultra vires* the purposes of the corporation, and moreover was not made with the board of trustees thereof. We think that case is not controlling here by reason of the difference in the nature of the charity. It cannot be claimed that the Grand Island College is a religious society conducting a general charity; but a private corporation for the education of the young. In the *Tabitha Home* case stress is laid upon the fact that contracts upon proper consideration had been made by aged persons for care during their lives, and for orphans during minority, which would become public charges should the charity fail. These features are not present in the instant case.

The distinction between the general college property and the endowment fund is that the former was given to the college unconditionally for the purpose of building and maintaining a school, while the latter was upon condition that only the income should be used. We conclude that the college property was subject to the mechanic's lien and claims of creditors.

It is argued that by reason of the unauthorized use by the trustees of part of the endowment fund for buildings, expenses and as collateral, they are estopped from claiming that such fund is a charitable trust. However this may be as to the funds wrongfully appropriated, the trustees could not by such action destroy the trust as to the remainder of the fund.

An attempted levy of execution was made upon some of the securities constituting a part of the endowment fund, contained in a safety deposit box. This was ineffectual, as no possession of the securities was retained by the officer, but the same were returned to the en-

dowment treasurer and no receipt taken therefor.

By the decree of the district court the attorneys for the trustees were allowed a fee of $500 payable out of the endowment funds. It is claimed this was not warranted. The trustees were in possession of the endowment funds and matters had proceeded so far that some of the creditors had attempted to levy upon them to collect their judgments. The trustees were in doubt as to their duty with reference to the fund, and we think the application to the court for instructions was eminently proper. The general rule is stated as follows: "Where the duty of a trustee is a matter of doubt, it is his right to ask and receive the aid and direction of a court of equity in the execution of his trust. In such cases, if reasonable grounds exist for coming into court to obtain the construction of the instrument creating the trust, the practice is to allow the costs and expenses, as it respects all the parties, and as between attorney and client, out of the trust funds." *Attorney General v. Moore's Executors*, 19 N. J. Eq. 503. No objection to this allowance is made except by a creditor, and in view of our holding that creditors have no claim upon the fund out of which the allowance is to be paid, the creditor is not in position to complain.

The question of the priorities between judgment creditors and those whose claims have not been reduced to judgment was reserved by the district court, and therefore cannot be determined by this court on appeal.

The creditors claim the right at all events to subject the income from the endowment fund to their debts, and suggest that the fund be placed in the hands of the receiver to so apply the income, though conceding such a procedure would be of little benefit. No doubt any accrued income in the hands of the trustees at the time the college closed, September 1, 1931, is subject to debts; but we think upon the happening of that event, the college being insolvent, the status of the endowment fund as an active instrumentality came to an end; the rights of the donors

or successors in trust became fixed, and the control of the court began. The interests of the donors, the successors in trust and the public require that the fund be restored to activity as promptly as may be.

The judgment of the district court is reversed and set aside and the court instructed to enter a decree in accordance with this opinion, establishing the endowment fund of Grand Island College as a charitable trust, approving and confirming the transfer of such fund to Sioux Falls College, to be held by it upon the same trusts and conditions as it was theretofore held by Grand Island College, establishing the mechanic's lien of Grand Island Plumbing Company as a first lien, and the various other matters determined hereby; that the receivers be directed to convert into cash all personal property and securities of the college not held in trust and after payment of costs, except attorney's fees allowed, distribute the same *pro rata* among the creditors; that the receivers dispose of the real estate of the college under direction of the court, the proceeds to be brought into court and disposed according to the rights of the parties to be determined by the court; that an attorneys' fee of $500 to plaintiffs' attorneys for services in the district court, and an additional fee of $500 for services in this court, which is hereby allowed, be taxed as costs to be paid out of the endowment fund.

REVERSED.

PAINE, J., dissenting.

Several statements made in the main opinion at once challenge the attention. First, it is stated therein that this action is brought by persons constituting the board of trustees of Grand Island College; but the petition names as plaintiffs some 20 individuals constituting the trustees of the endowment funds of said college,—a vital difference, as the facts disclose.

It is also stated that the endowment funds were kept separate from the general funds of the college. This over-

looks the fact that the testimony of the endowment treasurer during the last seven years, D. E. Magnusson, as found on page 311, is: "There has been nothing paid in the first instance to the endowment treasurer so far since I have been in office; I have received $5,000 from the Philip Kinney memorial and received in the form of a check of the treasurer of Grand Island College general funds in the Commercial Bank and turned over to me as endowment treasurer." On page 308 of the record the following testimony of Dr. George Sutherland appears: "By the Court: You are not sensing my question. I asked you to tell us whether or not that money that was received from donations and drives and the pledges, was received, was turned over to the endowment treasurer without any record being kept of the transactions and being copied in the books of the college. A. You will —yes, you will find the records in the minutes of the executive committee wherever their reports are made by those soliciting pledges and collecting money. By the Court: You are still not answering my question. Don't you know? A. I think that is all the books we had; there are no books."

It is stated in the main opinion that the decision of the district court for Hall county, rendered by Judges Clements and Horth, is generally against the plaintiffs. I find no such statement in the decree rendered by these two district judges, who have for many years been in touch locally with all the facts in the case. The important part of the prayer of the petition was for the judgment, advice, and direction of the court as to the administration of these funds. It would be strange indeed if the decree found generally against the plaintiffs, as stated in this main opinion, that the records of this court should show that the plaintiffs are the appellees in the case, and not appellants. The contest in this court is being waged, not by the plaintiffs, but by the three appellants, to wit, the board of education of the Northern Baptist Convention, a corporation organized under the laws of New York, and also the Sioux Falls University and Sioux Falls College,

which are seeking to absorb the remaining endowment funds of the Grand Island College. The longest argument in this court was made by C. C. Caldwell, an attorney of Sioux Falls, representing these appellants. The city of Grand Island, also an appellee, is a cross-appellant, objecting to the fee of $500 allowed to plaintiffs' attorney, and the Schreiners, annuitants, appellees, filed a motion for new trial on certain phases of the order relating to them. The trial court having found that the provision in the Schreiner annuity providing for the maintenance of a chair of English Bible in the Grand Island College, it was, therefore, only a direction or admonition to such college for the establishment of such chair. The decree further found that funds held under annuity contracts with Patterson, Pierce, Tavender, Turnbull, Yelton, and Coon were trusts, and the receivers in charge of the property were directed to strictly comply with the provisions in said annuity contracts until a settlement of the rights of the beneficiaries thereunder might be had. Hence, it is clear from the record that the plaintiffs are not the appellants, waging a contest in this court.

The evidence discloses that the first of the three nonresident corporations, to wit, the New York corporation, is naturally anxious to assist in founding a new Baptist institution, to be known as the Sioux Falls College, and readily consents, on behalf of its predecessor, the American Baptist Education Society, that all of the funds should be transferred to the new school in South Dakota, and the appellants have secured consents from several of the other larger givers that said funds can be moved intact to the new college to be established.

The main opinion is an interesting and scholarly discussion of the subject of charitable trusts by an experienced and able district judge of Omaha. It reviews, at considerable length, decisions from many states, including a number from Iowa. Little objection can be made to the opinion, except that many facts would be needed to sustain the findings if applied to this case, which facts I

confess I have been entirely unable to discover after a patient search of the records covering several days.

Would it not be well to review some of these basic facts? The articles of incorporation of the Grand Island College, adopted June 13, 1892, were signed by Honorable W. H. Thompson, and several others, and the minutes of the early meetings show that he was active during those years, but his name does not appear as a trustee in the later years.

The evidence discloses that the college ran from 1892 until September 1, 1931, on a campus consisting of about 30 acres; that it owns thereon an administration building, Hibbs Hall, a dormitory for girls, and a boys' dormitory, and an auditorium or gymnasium; that the campus has been carried upon the books of the college at a value of $30,000, and the buildings at a valuation of $249,500, but that the property is unmarketable; that the college was closed September 1, 1931, because it was unable to meet its current and necessary expenses, having become largely indebted to numerous creditors, and that it is unable to pay its indebtedness.

I cannot find that there was ever any authorization for any board of trustees of the endowment fund. On page 40, Judge Clements asked: "Was there any organization or corporation of the endowment fund?" Answer: "No further organization that I can find." Page 56: "By Mr. Mayer: The creditors do not join in the stipulation that the trustees of the Grand Island College were appointed trustees of the endowment fund belonging to the said Grand Island College. Our next objection is in regard to the creation of an endowment fund, that any such fund was ever created, and what went into it, and the creditors do not join in the stipulation that an endowment fund was created, and kept separate and distinct from the other funds of Grand Island College."

During the 38 years of its existence, there was at all times an endowment treasurer. There was also, during a part of the time, a committee, consisting of five mem-

bers of the board of trustees of 21 of the Grand Island College, which assisted the treasurer in handling and investing annuity and other special funds.

Many drives and campaigns were put on during the years of the college's existence for the purpose and with the sincere hope that a large endowment fund could be created, but these hopes were never realized, for during the entire 38 years the total sum of about $85,000 was actually collected for said purpose. These funds were usually paid to the secretary or treasurer, or often to the president, and paid over by such officers to the so-called endowment treasurer, but such funds were always under the sole and exclusive control of the board of trustees of the college, and orders that they made in their meetings were always the orders that determined what should be done with the funds. In the building of Hibbs Hall, the girls' dormitory, funds of approximately $26,000 were ordered by the board of trustees to be taken out of the endowment funds and used for the purpose of erecting this building. Toward the end of the existence of the college, it is testified that some $4,000 of such funds were used in the payment of the long past due salaries of the faithful teachers, and recently another sum of $5,388.56 was directed to be paid to the Grand Island Plumbing Company on its contract for rebuilding the heating plant. Not only were these sums taken out of the various endowment funds and used for running expenses and payment of other items, but in times of stress, when it was impossible to raise money at the moment, it is shown by the minutes in the record that endowment funds were frequently, during the years, put up as collateral at banks for the purpose of borrowing money to meet the salaries of teachers and other running expenses. A. B. Newell, the endowment treasurer for two years, testified, in answer to interrogatory 751: "I resigned for the reason that President Wells wanted to take some funds to put up as collateral at the bank and I wouldn't stand for it." Such use of these funds was so usual and customary that

a treasurer who would not consent thereto had the only alternative of resigning. It is also shown clearly by the evidence that practically all of such funds were payable to the Grand Island College, the only corporate entity by which such funds could legally be held. When a real estate mortgage held on such funds became delinquent, action of the board of trustees of the college directed a foreclosure suit, and when the property was bid in the title was taken in the name of the Grand Island College, not in the name of an endowment fund. It is also worthy of note that there was never at any time any definite name given to such funds.

If there was a legal entity known as an "Endowment Fund," it would so appear in the record. But a casual search of the bill of exceptions and exhibits discloses the following terms by which endowment funds of the Grand Island College were known and styled: Unclassified General Endowment, Webster General Endowment, Permanent Endowment Fund, Strong Missionary Scholarship, Library Fund, Philip Kinney Memorial, Permanent Fund Assets, General Endowment Fund, Special Endowment Funds, Patterson Prize Fund, Victor Person Memorial, Warren Scholarship Fund, Ministerial Scholarship Fund, Y. M. C. A. Endowment Gift, Productive Endowment, and the Coon and several other annuities.

Do these appellations not appear to one as simply different ledger accounts in the ledger funds of the Grand Island College? Each was kept separate in a manner which would allow a report to be made to the donor, but such funds were always legally the property of the Grand Island College, and of no other corporation.

It was finally stipulated between the parties that there was no organization or incorporation of the endowment fund in accordance with section 24-712, Comp. St. 1929, which was the law of our state during all of the time of the existence of the college.

Article 10 of the charter provides that the board of trustees shall have full power and authority to carry into

effect the purposes of this incorporation; shall have the general care and disposal of the funds and property of the corporation for the benefit of the college, and may use and invest said property and funds in such a way and manner as may to them seem most effective, subject, however, to the laws of this state and the conditions and purposes of special endowments, bequests and donations. In the articles of incorporation I fail to see any mention made of an endowment fund, or endowment treasurer, or endowment committee, but article 8 says the board of trustees shall have power to elect a president, professors, tutors, and teachers, and such other agents and officers as may be deemed advisable, and to fix the compensation of each, and to remove the same at pleasure.

The records are filled with the aims, hopes, and plans for absorbing the funds of this bankrupt institution into the new college to be organized in South Dakota; may we not, in fairness to the appellees, examine their claims for a moment?

Exhibit 48 is the audit from May 1, 1931, to October 31, 1931, of the college, at which time the accounts payable had reached the sum of $24,126.16. Among the larger items making up this total, as shown by schedule 4 of the said exhibit, were the following accounts of coal, repairs, and supplies to keep said college in operation: American Beet Sugar Co., $1,047.94; Augustine Company, $966.39; City Electric Dep't, $861.23; Chicago Lumber Co., $4,354.70; Goehring-Sothman Co., $1,305.37; Grand Island Plumbing Co., $5,277.11; Independent Publishing Co., $1,639.83; Lowe & Campbell, $762.51; miscellaneous, $7,911.08; total, $24,126.16.

Schedule 3 of the same exhibit gives the list of notes payable, among which we find: Commercial Bank, $10,885; Grand Island Nat. Bank, $3,000; Chapman State Bank, $2,000; The Augustine Co., $2,942.69; Nebraska Loan & Trust Co., $5,000; Fidelity Nat. Bank & Trust Co., $1,881.25; George Sutherland, $531.20; miscellaneous, $1,125.57; total, $27,365.71. Then comes in schedule

3 the notes which have been given by the Grand Island College for salaries to teachers and other employees, among which are listed: Sabra Abbott, $392.65; Harriet Anderson, $1,196.66; Ella Blunk, $60; G. Robert Coatney, $136.50; Carolyn B. Cowell, $672; Mary B. Fox, $300; C. S. Griffin, $1,132; Margaret Gelatt, $136.50; Bennett Hites, $754.84; J. D. Jackson, $1,317; W. A. Karraker, $797.40; W. A. Knox, $1,399.57; Alice Lindburg, $730; W. T. McDonald, $1,490.80; Harriet Norris, $57; J. H. Pollard, $1,480; A. C. Rice, $2,202.50; Lawrence Ritchie, $678.89; Mrs. F. A. Rush, $387.50; Laurene Steven, $828; George Sutherland, $140; F. J. Titt, $1,433.58; miscellaneous, $5,880.40; giving a total of $23,603.79, or a grand total of the notes payable outstanding, $50,969.50, and adding the accounts payable of $24,126.16 gives us $75,095.66. In order to avoid the unnecessary costs of a multiplicity of suits, practically all of these accounts and bills payable were assigned to several attorneys for more expeditious handling.

It is stated in the main opinion that upon May 6, 1931, the Grand Island College entered into a written contract with Sioux Falls University, of Sioux Falls, South Dakota, to consolidate said colleges. I fail to find any evidence supporting this statement. It only appears that two officers of the college, the vice-president and the secretary, entered into such agreement, and I can find no evidence of any action of the board of trustees of the Grand Island College, taken as required by the articles of incorporation, approving said contract. Article 2 of the charter provides that its principal office and place of business shall be forever kept and maintained at Grand Island, Nebraska. Article 4 provides that the management of this corporation shall be vested in a board of 21 trustees, five of whom shall be resident freeholders of Hall county, Nebraska.

It is clear that the attempted purported contract, entered into by the vice-president and secretary of the board of trustees of the Grand Island College with the Sioux

Falls University, is void, as it is clearly in violation of the provisions of the articles of incorporation of the Grand Island College. Yet the main opinion finds that, in spite of these undisputed facts, the contract with the South Dakota college merely selects a new trustee to handle these funds, and approves the contract simply signed by two officers, with no required corporate action upon which to base their authority.

Let us examine a few of the authorities. *Horton v. Tabitha Home,* 102 Neb. 677. The first opinion in this case is found in 95 Neb. 491. It holds that where a charitable institution has received substantial benefits from improvements made on its property, but is not liable for the cost because the main object was not within the powers and purposes of the institution, the court will order any funds so raised to the payment of the costs. To the decision in 95 Neb. 491, Judge Letton dissented. The hospital erected was not successful, and an attempt was made to foreclose a mechanic's lien, and the majority of the court held that no such lien could be asserted against a charitable institution. Judge Letton dissenting to the decision in 102 Neb. 677, says: "The great weight of authority is to the contrary." See annotation, Ann. Cas. 1915D, 1145, and 51 L. R. A. n. s. 161. Judge Letton says further: "It has always been my opinion that the materialmen were entitled to the liens they asserted. Most certainly, if not entitled to liens, they should be entitled to a judgment against the corporation for the price of the articles supplied. To hold otherwise is to permit a corporation organized for charitable purposes to use charity as a sword, and not as a shield, and to obtain property of others without paying for it, which is repugnant to every legal and moral principle. Charity is said to cover a multitude of sins. In this case it is used to cover the wrongful deprivation of these merchants of their property without compensation."

It has been held that, where property is donated to a charitable corporation, although donor adds that it is to

be used for certain purposes, when those purposes are among those for which the charity was incorporated, no trust is created, for one cannot be a trustee and a beneficiary at the same time. *Woman's Foreign Missionary Society v. Mitchell,* 93 Md. 199.

In *Lyons v. Planters Loan & Savings Bank,* 86 Ga. 485, 12 L. R. A. 155, it is said: "If any class of debtors ought to pay, as matter of moral as well as legal duty, the good people of a Christian church are that class. No church can have any higher obligation resting upon it than that of being just. * * * The law grants exemptions of property to families, but none to private corporations or collective bodies, lay or ecclesiastical. These must pay their debts if they can. All their property legal and equitable is subject."

Presbyterian Congregation of Erie v. Colt's Executors, 2 Grant's Cases (Pa.) 75: "The power given to religious societies to hold land was not intended to prevent them from selling it nor to enable them to hold it against their creditors, but to hold and sell it as individuals could do, always subject to the claims of creditors. * * * It may well be questioned whether it would be for the public benefit to allow them to disregard their contracts."

A gift to a corporation conditioned upon a use for which said corporation is incorporated makes such gift absolute, and not a trust. In *Greene v. Greene,* 125 N. Y. 506, 21 Am. St. Rep. 743, it is held that there are three essential elements of every express trust, viz., a trustee, an estate, and a beneficiary, and that the trustee and beneficiary must be distinct personalities, or otherwise there could be no trust, and the merger of interests in the same person would effect a legal estate in him.

Cases could be cited by the page in support of these contentions, but our supreme court, in the case of *Clarke v. Sisters of Society of the Holy Child Jesus,* 82 Neb. 85, in the first syllabus, said: "It is a general rule that, where property is conveyed directly to a corporation to hold for use in the purpose for which the corporation

was created, no trust for the benefit of others arises, even though the conveyance contains a condition directing the use of the property in a certain manner from which third parties may be benefited. One cannot be a trustee of property and a beneficiary at the same time." This holding of our court has never been modified in any way, and the facts in the case at bar clearly bring it within the law announced, and even though the Iowa courts may have held contrary to this holding, we are required to follow our own decisions.

It is further stated in the main opinion that nearly all of the contributors to the endowment special funds and annuities have joined in the prayer of the petition and filed consent. The evidence discloses, on the contrary, that hundreds of charitably inclined citizens of Grand Island, of the state of Nebraska, and a very few outside, have down through the years contributed in the frequent drives and campaigns for endowment and other funds put on by said college during its 38 years of existence, and that not to exceed a half dozen out of these many donors have consented to this, as stated in the main decision.

E. W. Augustine, H. G. Wellensiek and Herbert F. Mayer were appointed receivers by the district court at Grand Island to take charge of all the property of the Grand Island College, and were directed by the trial court to sell the property and pay the costs, then pay the claims in judgment of the Grand Island Plumbing Company and the Chicago Lumber Company, and pay the balance remaining *pro rata* to the creditors of the college in such amounts and at such times as may be ordered by the court. Such an order, after carefully providing funds to carry out all annuity contracts, is just and equitable to these creditors.

Even if we should admit that the main opinion is right, yet justice and equity demand that all income from said funds be paid to these creditors up to the time that the funds should be turned over to the South Dakota college,

but even this crumb of comfort is denied them by the main opinion, which says that only accrued income up to the date September 1, 1931, could be applied on these debts on which date it says the status of the endowment fund as an active instrumentality came to an end. With this statement I entirely disagree. While the college became bankrupt and ceased to run, yet these funds still belong to the Grand Island College, and the public interest requires that they be applied to the payment of the debts incurred by creditors who furnished materials or labor, or worked as members of the teaching staff, during the last few years of the college's existence. It certainly would not be in the hearts and minds of the charitable Christian people who donated these funds that such creditors, whose labor and materials kept the college alive, as the donors wished, should now get nothing, and the funds be transferred to establish a new college in South Dakota, of which college only a few of the donors have ever heard.

It is evident that all alleged endowment funds were donated to the Grand Island College and are the property of such college; that, aside from the special annuity contracts, the creditors of said college are entitled to reach said funds for the payment of teachers' salaries, coal bills, plumbing bills, and other items, without which the college could not have functioned during the past few years. Such claims have all been found to be valid, and several of them have been reduced to judgment. If the main opinion in this case is carried out and the land is sold at present prices, it is doubtful if it will bring enough to pay the judgment creditors, and nothing whatever would be left to pay the claims of teachers and all of the other creditors.

In the main opinion these creditors are denied even the right to have the endowment funds held by the receivers of the court until the income therefrom would pay the debts of the creditors outstanding. There is a maxim that a debtor must be just before he can be generous; that he

must pay his creditors before he can transfer his property as a donation to a volunteer. This seems to have been ignored in this main opinion, to which I most respectfully dissent.

LASALLE EXTENSION UNIVERSITY, APPELLANT, V. JAMES FOGARTY, APPELLEE.

FILED MARCH 16, 1934. No. 28753.

Damages. Threats to sue and to appeal to one's employer, made wilfully and intentionally, for the purpose of producing mental pain and anguish, in attempting to collect a debt, *held* to authorize recovery for mental pain and suffering, though no physical injury results.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

Adolph A. Carl and *M. L. McBride*, for appellant.

J. W. Marer and *Eugene B. McArdle, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

RYAN, District Judge.

This action was commenced in municipal court of the city of Omaha and was tried on appeal in the district court for Douglas county upon the same pleadings by stipulation. The action is upon a promissory note, alleged to have been signed by the defendant, James Fogarty, for a study course in the school of the appellant, the said note being given for tuition and scholarship. The answer of the defendant denied the execution and delivery of the note and application for scholarship in the correspondence school of the plaintiff, admitted that the defendant did sign a purported application and promissory note, but alleged that the same were wholly null and void by reason of sections 62-1708 and 62-1710, Comp. St. 1929, because

said alleged tuition note did not have printed prominently and legibly in bold type across the face thereof and above the signature thereon the words "negotiable note given for tuition." Defendant included in his answer a cross-petition for damages in the sum of $500, claimed to have been suffered by him on account of a series of damaging, threatening, harassing and malicious letters, notices and warnings, which defendant alleges plaintiff wrote and caused to be mailed to the defendant for the purpose of unlawfully extorting from the defendant the money claimed due in this suit; and defendant alleges that the acts of the plaintiff were done unlawfully, maliciously and in an attempt to extort payment of money from the defendant, and at the time of making said threats plaintiff knew, or should have known, that the note could not legally be collected, and said acts were done for the purpose of harassing, annoying, distressing and worrying the defendant into the payment of the same. Defendant also alleged that the plaintiff wrote letters to his employer and to his neighbors for the same purpose and caused the defendant to seek legal advice for his protection, and that by reason of the same he was humiliated and unable to sleep at night and was unable to do his work properly, and that it caused him to become nervous, and that he suffered much pain and mental anguish on account thereof.

Plaintiff was unable to prove the execution and delivery of the note and at the close of its evidence the trial court sustained the motion of the defendant to dismiss the petition of the plaintiff for the reason that there was no evidence before the court to support its claim. The case proceeded to trial upon the cross-petition of the defendant, without objection. The record shows that the defendant was a man of about thirty-five years of age, employed as a meter deposit clerk at the Nebraska Power Company; that about July 2, 1928, a representative of the plaintiff tried to interest him in one of the plaintiff's correspondence courses; that he was about to go on his vacation and he told the representative that he could not

take the course because he had no money to pay down on it at that time. The representative said to him: "Well, I'll tell you, * * * if you will take and just give me $3 on the application, when you return, if you decide that you want to take the course, you can pay me the other $7, and if you don't want to take the course, I will refund your $3, and your application will not be sent in until you decide one way or the other." The $3 was paid and an application signed. Defendant was absent about two weeks on his vacation. He testified that he did not see the agent of the plaintiff again, and that shortly thereafter he received a set of books from the plaintiff and soon he began receiving collection letters; that in October he wrote plaintiff a letter, explaining his dealings with their agent and stating that he did not consider he had made any contract with them. The collection letters from the plaintiff continued. He had written plaintiff, he thought, at least two letters. These letters are admitted as having been received by plaintiff, but appear to have been destroyed. The plaintiff continued with its course of collection letters. About forty of them are contained in the bill of exceptions. These letters vary from moderate reminders of an unpaid balance to accusations of dishonesty and moral turpitude and threats, and were such as were well calculated to coerce the defendant into payment. Some of them were in lurid envelopes, and in one both the letterhead and envelope bore a facsimile of lightning about to strike someone. One of them read as follows: "Honest men pay their debts. Dishonest men do not pay their debts. You owe us $140. Classify yourself." One of them was a garnishment notice with the name of his employer in the heading of the petition. One was on deep red paper and labeled: "Final notice before legal action." The plaintiff also wrote his employer, the Nebraska Power Company, as well as his neighbors living on either side of him. Defendant testified that the receipt of these letters caused him a great deal of worry and mental pain and anguish; that he worried a great deal

that he might lose his job. The chief clerk at the Nebraska Power Company, who was the defendant's superior, testified as to the receipt of a letter written to him, which he produced and which was received in evidence. This letter purported to set out the transaction between the parties and to threaten garnishment of the defendant's wages. The witness talked with the defendant about it and told him: "Our company wasn't having men working for us who had their salaries garnisheed, and if in case he had anything like that, we would have to do one thing or the other, either pay the bills or have to dismiss him." Defendant's next door neighbor testified as to receiving a letter inquiring about him; she opened it and read it and gave it to the defendant; and testified that she "kidded him about getting a red letter." The letter received by the witness was easily identified as a collection letter and was well adapted to cast discredit upon the defendant. The jury returned a verdict in favor of the defendant on his counterclaim in the sum of $500. Plaintiff's motion for a new trial was overruled and the cause comes to this court on appeal.

Appellant does not seriously contend that there was error in dismissing the plaintiff's petition. The appeal is directed solely toward the recovery on the counterclaim, the contention being that the verdict of the jury is not sustained by the evidence; that damages are not recoverable for mental suffering alone; and that the verdict is excessive.

No decision of this court exactly in point has been cited tc us in the briefs, and we are unable to find any. The case of *Kurpgeweit v. Kirby*, 88 Neb. 72, is somewhat analogous, in that it holds that damages are recoverable in certain cases for mental suffering and humiliation, without evidence of any physical injury. The facts in that case are quite lengthy and it would serve no good purpose to detail them here.

However, the supreme court of Iowa passed upon a very similar situation in the case of *Barnett v. Collection Serv-*

ice Co., 214 Ia. 1303. In that case the court held: "Threats to sue and to appeal to plaintiff's employer, made wilfully and intentionally for the purpose of producing mental pain and anguish, in attempting to collect debt, *held* to authorize recovery for mental pain and suffering." (242 N. W. 25.) In that case the appellants had a claim for collection against the appellee and in attempting to collect same wrote a series of letters. The contents of the letters are not set out in the opinion, but in discussing them the court say: "It is frankly conceded by counsel for appellants 'that the form letters sent to the plaintiff (appellee) might have been couched in a little more diplomatic and tender language.' This is undoubtedly true. The letters were coarse, and a jury could readily find that they were vindictive. They contained threats of various kinds as to what the appellants would do in the event that the appellee did not pay said claim. None of these threats had reference to physical violence or injury. The letters contained threats to sue, to appeal directly to appellee's employer, with the assurance that this would be successful and 'we will bother him until he is so disgusted with you that he will throw you out the back door.' And again: 'You will settle in full your account with the above through this office within the next five days or we will tie you up tighter than a drum.' There is also a suggestion that the appellee was as bad as a criminal, and other similar matters." In this case the only damages sought by the appellee were for mental pain, anguish and humiliation, which she claimed to have suffered by reason of receiving the series of letters written by the appellants. She testified by reason of the said letters she became nervous and could not work and could not rest; that she suffered mental pain and anguish; that she cried and was compelled to go to bed. The court said: "The jury could have found that this condition was produced solely by the threats and other language of the letters." The only question raised by the appeal in that case was whether or not the appellee had pleaded and proved a

cause of action. The opinion contains quite an exhaustive discussion of authorities from many jurisdictions and draws the quite well-known distinction between the cases relied upon by the appellants and the facts in that case, which are very similar to the facts in this case. It sums up its conclusions thus:

"The rule seems to be well established that, where the act is wilful or malicious, as distinguished from being merely negligent, recovery may be had for mental pain, though no physical injury results. In such a case the door to recovery should be opened but narrowly and with due caution. A creditor or his agent has a right to urge payment of a just debt and to threaten to resort to proper legal procedure to enforce such payment. In this case the jury could well find that appellants exceeded their legal rights, and that they wilfully and intentionally sought to produce mental pain and anguish in the appellee, and that the natural result of such acts was to produce such mental pain and anguish.

"We are constrained to hold that the appellee pleaded a cause of action and that the evidence was sufficient to sustain the verdict."

In 8 R. C. L. 531, sec. 84, the rule is thus stated: "In cases of wilful and wanton wrongs and those committed with malice and an intention to cause mental distress, damages are, as a general rule, recoverable for mental suffering even without bodily injury, and though no pecuniary damage is alleged or proved."

The distinction seems to be in all of the cases as between an act or series of acts done wilfully and purposely or maliciously and acts which are merely the result of negligence. In this case the plaintiff unquestionably had a right to demand payment of its claim. There was, however, no justification for writing the long series of harassing and threatening letters over a period of nearly two years, as was done in this case. The defendant wrote to them and stated his position fully. These letters were not preserved, but their reception is admitted by the plain-

tiff and their contents testified to by the defendant. Plaintiff knew then that defendant denied liability on the note sued upon and was not justified in writing more than a few ordinary collection letters. Certainly the series of thirty-seven letters written to the defendant, which are preserved in the bill of exceptions, and the letter written to his employer and the two written to his neighbors, and the adoption of pseudo-legal forms, was wholly unjustified and inexcusable. No reasonable mind could reach any other conclusion than that they were written designedly and for the purpose of harassing the defendant until he would meet their demands, whether the sum claimed was justly due or not.

The judgment of the district court is

AFFIRMED.

HERMAN CASARI, APPELLANT, V. EARL WINCHESTER ET AL., APPELLEES.

FILED MARCH 16, 1934. No. 28770.

Trial. Instructions given to a jury must be considered together, and if, when considered as a whole, they properly state the law, it is sufficient.

APPEAL from the district court for Hall county: RALPH R. HORTH, JUDGE. *Affirmed.*

Bartos, Bartos & Placek and *H. G. Wellensiek,* for appellant.

Cleary, Suhr & Davis, Prince & Prince and *Sanden, Anderson & Gradwohl, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

RYAN, District Judge.

Plaintiff brought this action against the defendants to recover damages for personal injuries and injury to prop-

erty suffered in an automobile accident. The petition of the plaintiff alleges in substance that on the 9th day of August, 1930, while he was driving his Hudson automobile westward on state highway No. 30, he was struck by a Ford automobile owned and operated by the defendant Earl Winchester; that the accident occurred about 11:45 p. m., at a point about three and one-half miles west of Gibbon, Nebraska, on said highway, and in the following manner: That as plaintiff reached the point of accident a truck owned by defendants Columbus Nielsen and Walter Peterson was left by their agents, servants and employees on the south side of said highway, with dimmed headlights and no tail lights; that the operator of said truck was, at the time of the accident, asleep; that the truck concealed a view of the road to the back of it and also to the front of it; that as plaintiff approached said truck his view of the road to the west was obstructed by said truck, and as he reached a point about opposite to said truck, Earl Winchester, one of the defendants in said action, who was traveling in an automobile eastward on said highway at a rate of speed of about 45 miles an hour, carelessly and negligently attempted to pass said truck as it was parked, at the same instant of time the plaintiff was with his automobile opposite said truck, and a collision occurred between the two automobiles; that the defendants Nielsen and Peterson were guilty of gross negligence in permitting their said truck to be left standing on the traveled side of the highway, with dimmed headlights and no tail lights burning, with the operator asleep, and no precaution taken to warn the traveling public using said highway of the danger caused by the truck being parked thereon.

There are other allegations of negligence as to the defendant Earl Winchester, but this defendant defaulted and judgment was rendered against him, and it is not necessary to lengthen this opinion by a further recitation of the elements of negligence alleged against him.

The answer of the defendants Columbus Nielsen and

Walter Peterson in substance admits that the defendant Earl Winchester was guilty of negligence, and alleges contributory negligence on the part of plaintiff, but denies any negligence on the part of the operator of their truck. It also alleges that the headlights and tail lights were in full function and burning at all times mentioned in the plaintiff's petition, and that in addition thereto the said truck was equipped with a large reflector on the rear end, in full and efficient function and use, and alleges that said truck was parked at the limit of the right and proper side of said highway; that it had been there stationary by reason of the fact that it became necessary for its driver to make engine repairs, at which task he was occupied as it stood stationary.

The jury returned a verdict finding that no cause of action existed against the defendants Nielsen and Peterson. The defendant Earl Winchester defaulted and a verdict was returned against him in the amount of $4,-864.20. The plaintiff appeals and assigns as error that the court erred in giving certain instructions on its own motion, and further that there was error in refusing to give certain instructions requested by the plaintiff.

Plaintiff assigns the giving of instructions Nos. 4, 11, 14, 16, 19, 20, 22, and 25 by the court on its own motion as error. Instruction No. 4 is merely the statement of issues as between the plaintiff and the defendants Nielsen and Peterson. In instruction No. 11 the jurors were told that the burden of proving the negligence, charged by the defendants against the plaintiff, was upon the defendants. Instruction No. 14 states the speed limit under the laws of the state of Nebraska for the operation of a motor vehicle outside of any city or village. By instruction No. 16 the jurors were advised of the law with reference to the lights required upon motor vehicles. Instruction No. 19 told the jurors that, in the event that the plaintiff was negligent and that the defendant Winchester was negligent, and that the negligence of the defendant Winchester and the negligence of the plaintiff were the exclusive

proximate causes of the plaintiff's injuries, then their verdict must be in favor of the defendants Nielsen and Peterson. By instruction No. 20 the jurors were told that, if they found from a preponderance of the evidence that the defendants Nielsen and Peterson were guilty of negligence and that such negligence was the proximate cause of plaintiff's injuries, then their verdict should be in favor of plaintiff. Instruction No. 22 defines proximate cause. By instruction No. 25 the jurors were told that "the mere parking of a motor vehicle along the south side of a traveled highway, by one traveling eastward, for the purpose of making necessary repairs, is not, in itself, negligence." These instructions appear to correctly state the law and we find nothing in them prejudicial to the rights of the plaintiff.

The matters contained in the instructions requested by the plaintiff were fully covered by the court and these instructions were properly refused.

Plaintiff also complains of instructions Nos. 8 and 21. Instruction No. 8 reads as follows: "You are instructed that to establish a cause of action based on the negligence of the defendants it is not sufficient for plaintiff to show that the defendants were negligent, but plaintiff must also show, by a preponderance of the evidence, that the negligence of the defendants, as pleaded and proved, was the proximate cause of the injuries complained of, and in this case, even though you find the defendants, Columbus Nielsen and Walter Peterson, doing business under the firm and style name of Nielsen & Peterson Company, and Nielsen & Peterson Company, were negligent, your verdict should be in favor of said defendants, unless you further find that such negligence on the part of said defendants was the proximate cause of the injuries complained of." Instruction No. 21 reads as follows: "You are instructed that if one suffers injuries as the proximate result of the negligence of two parties, acting independently of each other, and such injuries would not have occurred but for the negligence of each of such parties, it is no defense

for one of the parties to show that the other party was negligent; and in this case, if you find from a preponderance of the evidence that the defendants Columbus Nielsen and Walter Peterson, doing business under the firm and style name of Nielsen & Peterson Company, and Nielsen & Peterson Company, were negligent, and that the negligence of the defendant Earl Winchester, and the defendants Columbus Nielsen and Walter Peterson, doing business under the firm and style name of Nielsen & Peterson Company, and Nielsen & Peterson Company, was the exclusive proximate cause of plaintiff's injuries and that such injuries to plaintiff would not have occurred except for the negligence of the defendant, Earl Winchester, and the negligence of the defendants, Columbus Nielsen and Walter Peterson, doing business under the firm and style name of Nielsen & Peterson Company, and Nielsen & Peterson Company, and you further find that the plaintiff's negligence was not a proximate cause of his injuries, then your verdict should be in favor of the plaintiff."

Instruction No. 8 is incomplete, in that it fails to inform the jury that, in the event they found that both defendants were negligent and that the combined or concurrent negligence of both defendants was the proximate cause of the injury, then plaintiff had a right to recover also against the defendants Nielsen and Peterson. Still, taking it in connection with instruction No. 21, we do not see how the jury could have been misled by it. Instruction No. 21 appears to be a correct statement of the law. True, it would have been more exact if the court had used the plural instead of the singular in referring to the proximate cause, as was done in instruction No. 19, for there may be more than one proximate cause of an injury.

This court has frequently laid down the rule that the instructions given to a jury must be considered together, and if, when considered as a whole, they properly state the law, it is sufficient. *Campbell v. Holland*, 22 Neb. 587;

Lincoln Traction Co. v. Brookover, 77 Neb. 221; *Brailey v. Omaha & C. B. Street R. Co.*, 105 Neb. 201.

The instructions are rather lengthy and perhaps could have been shortened considerably. We might also remark that they are made quite cumbersome and somewhat difficult to read because of the fact that the learned trial judge felt bound to use the full and technical name of the partnership existing between the defendants Nielsen and Peterson. The instructions would read much more smoothly, had he seen fit to refer to said defendants merely as the defendants Nielsen and Peterson. This could not have been in any way misleading, particularly if the court had stated in his opening instruction that for convenience these defendants would be so designated.

Applying the rule above stated, however, we see no cause for reversing this case on account of the instructions. It follows, therefore, that the judgment of the district court must be

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS STATE BANK, E. H. LUIKART, RECEIVER, APPELLEE: SCHOOL DISTRICT NO. 8, INTERVENER, APPELLANT.

FILED MARCH 23, 1934. No. 28894.

Judgment affirmed on the authority of *State v. Farmers & Merchants Bank*, *ante*, p. 245.

APPEAL from the district court for Hall county: RALPH R. HORTH, JUDGE. *Affirmed.*

Harry Grimminger, for appellant.

F. C. Radke and *Barlow Nye*, *contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LANDIS, District Judge.

PER CURIAM.

This is a proceeding in equity to have adjudged as a trust fund deposits aggregating $5,007.35, made by a school district treasurer in the Farmers State Bank of Wood River (while a going concern) after substantial compliance by School District No. 8 of Wood River, Hall county, with sections 77-2525, 77-2526, Comp. St. Supp. 1933. Such depository bank subsequently became insolvent.

In the district court the prayer of the school district was denied, and the funds thus deposited were adjudged to be a general deposit. From this judgment the school district appeals.

The facts of the transaction are very similar to those involved in *State v. Farmers & Merchants Bank, ante,* p. 245, wherein this court announced the controlling principle that "Deposit of school district funds in a duly designated depository, in the absence of special agreement to the contrary, constitutes a general deposit."

It necessarily follows that the judgment of the trial court, being in harmony with the conclusion of this tribunal so declared, is right, and, on the authority of *State v. Farmers & Merchants Bank, supra,* is

AFFIRMED.

I. H. MCRAE ET AL., APPELLANTS, V. MERCURY INSURANCE COMPANY, APPELLEE.

FILED MARCH 23, 1934. No. 28808.

1. **Insurance:** CANCELATION. An agreement for the immediate cancelation of a fire insurance policy, without giving five days' notice, can be made, and this can be shown by acts and conduct as well as by direct words.
2. ———: ———. Acquiescence in a cancelation notice will operate to cancel a fire insurance policy and will work an estoppel to assert that the policy is still in force.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Cleary, Horan & Skutt, for appellants.

Montgomery, Hall & Young, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

GOSS, C. J.

This was an action to recover on an automobile fire insurance policy. At the conclusion of the evidence defendant moved for an instructed verdict or for a dismissal. The court entered a dismissal. Plaintiffs appealed.

On September 20, 1929, plaintiffs bought of Marmon Brothers, Inc., of Kansas City, a Marmon sedan. They did not pay in cash the entire consideration. The unpaid balance was financed by Atlas Acceptance Corporation, which purchased the policy from defendant through Oppenheimer Brothers, insurance agents. The policy was for $1,275, and covered both fire and theft. The mortgage evidencing the interest of Atlas Acceptance Corporation was for $845.60, to secure four equal notes due each three months beginning January 1, 1930. The total premium was $16.07. July 4, 1930, the car took fire while being driven and was largely destroyed. When traded in for another car an allowance of $316 was made on it.

The defense is that the policy was canceled November 25, 1929, in accordance with a provision in the policy that it might be canceled on five days' written notice, mailed to the address of the assured. The evidence shows that the chattel mortgage authorized the mortgagee or assigns to keep the property insured covering loss from fire or theft until all of the notes and interest were fully paid. On November 25, 1929, Oppenheimer Brothers, as agents for defendant, by registered letter, notified plaintiffs of the cancelation of the policy. The insurance had been obtained by the Atlas Acceptance Corporation and the premium for it was paid by this corporation and in-

cluded in plaintiffs' notes. When the policy was canceled, the unearned premium, amounting to $13.18, was returned to the corporation and was by it credited to plaintiffs on its books, where, for its own convenience, it kept account of plaintiffs' notes and insurance. When the policy was canceled the acceptance corporation obtained a policy, to protect its interests only, at a premium cost of $8.99, which it charged to plaintiffs' account, leaving a balance of $4.19 return premium to which plaintiffs would be entitled when they made final settlement on their notes. The unearned premium was returned to the corporation rather than to plaintiffs because Oppenheimer Brothers, the agents, had dealt with the corporation and not with plaintiffs.

Plaintiffs received notice November 25, 1929, that the policy had been canceled. Not until January 15, 1930, did they take any steps or show any interest in the matter. Then, for the first time shown in the evidence, they manifested interest to the extent of a letter to the insurance agents calling attention to the fact that they had "never received the unearned premium of 10 months due on this cancelation." This letter was referred to the acceptance corporation, and on January 17, 1930, it advised plaintiffs by letter that their account had been credited with $4.19, return premium. To this plaintiffs answered under date of January 18, 1930, referring to the policy as "canceled" on November 25, 1929, analyzing the insurance premiums and the time the policy was in force, arriving at the conclusion there was $13.39 return premium due them and asking for a check for that sum. January 20, 1930, the acceptance corporation replied that the return premium was $13.18 but that $8.99 of this was invested in a new policy to protect the interests of the acceptance corporation, as mortgagee, leaving a balance of $4.19 due plaintiffs, and stating that the reason they were not paid this amount was due to the fact that plaintiffs did not pay the insurance in cash but it was included in their notes and would not be paid until the notes were paid. Plaintiffs

seemed satisfied with that explanation. No further communications were had on the subject. On April 4, 1930, they paid the note due April 1, 1930. On July 3, 1930, they gave a check for the note due July 1, 1930. When the automobile burned on July 4, 1930, they stopped payment on that check, but later in July plaintiffs paid the note due July 1 and at the same time the note due October 1, 1930, was discounted and paid by plaintiffs. This was probably done to release the acceptance corporation lien so the damaged car could be traded in by plaintiffs on a new car. From January 20, 1930, indeed, from the receipt of the notice of cancelation in November, 1929, plaintiffs apparently acquiesced in the fact of cancelation. From January 20, 1930, to the date of the fire they appeared to be satisfied with the adjustment of the return premium by the acceptance corporation. During this period no notice was brought home to defendant that they repudiated the cancelation. Defendant pleaded that, by their conduct, plaintiffs accepted the notice of cancelation as sufficient, waived strict compliance with the terms of the policy, waived a tender of the return of the premium, and are now estopped to assert that the policy was not canceled or to assert that the policy was in force when the fire occurred.

The questions of law are whether the notice of cancelation was sufficient to perform that office, and whether, if not sufficient, plaintiffs have waived the point or are estopped to assert that the policy was in force when the fire occurred.

The notice, dated November 25, 1929, did not state that the policy would be canceled in five days, as provided by the policy, but stated that the policy "is canceled in accordance with its terms as of November 25, 1929."

When a written notice is given the insured stating that the policy is already canceled, it will be considered as if it stated that the policy will be canceled in five days, where the policy has a provision to allow five days for the notice of cancelation to become operative. *Hanover Fire Ins. Co.*

v. Wood, 209 Ala. 380; *Davidson v. German Ins. Co.,* 74 N. J. Law, 487; *Grant Lumber Co. v. North River Ins. Co.,* 253 Fed. 83.

"An agreement for an immediate cancelation without giving five days' notice can be made, and this can be shown by acts and conduct as well as by direct words." *Home Ins. Co. v. Chattahoochee Lumber Co.,* 126 Ga. 334. The same principle applies to a life insurance policy. *Missouri State Life Ins. Co. v. Hill,* 109 Ark. 17.

Acquiescence in a cancelation notice will operate to cancel the policy and will work an estoppel to assert that the policy is still in force. *Hopkins & Cochran v. Phoenix Ins. Co.,* 78 Ia. 344; *Hillock v. Traders Ins. Co.,* 54 Mich. 531; *Missouri State Life Ins. Co. v. Hill,* 109 Ark. 17.

Plaintiffs were in no way misled by the insurance company. Their dealings were almost entirely with the acceptance corporation. They were not deceived by that corporation, which is not a party to the action. When the policy was canceled, the mortgagee protected its interest by the coverage of a new policy. At least as early as January 20, 1930, the mortgagee notified plaintiffs it had spent $8.99 of the return premium in a policy covering its insurable interest and held the balance of $4.19 to await final payment on the notes. Plaintiffs appear to have acquiesced in the cancelation but sought to get back all premiums returned. We think the trial court was right in deciding that they had waived the defects, if any, in the matter of the cancelation of the policy, and that their conduct was inconsistent with their claim that the policy was in force when the fire occurred.

The judgment of the district court is

AFFIRMED.

BEGLEY, District Judge, died March 4, 1934, and took no part in the decision.

ERNEST A. DWORAK, APPELLEE, V. ELI SHIRE, APPELLANT.

FILED MARCH 23, 1934. No. 28881.

1. **Trial.** In a law action, where the evidence is in substantial conflict, the decision of fact is for the jury.
2. **Appeal.** A judgment on a verdict will not be set aside when the evidence of the prevailing party sustains the verdict.
3. **Evidence** and instructions examined and *held* to be free from prejudicial error.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Beghtol, Foe & Rankin, for appellant.

John J. Wilson, C. J. Campbell and *Hotz & Hotz, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LANDIS, District Judge.

GOSS, C. J.

This action was for $1,000, for professional services as an accountant. From a judgment of $750 principal and $154.73 interest against him, defendant appeals.

The petition alleged that about December 1, 1929, defendant orally requested plaintiff, an income tax consultant and certified public accountant, to perform certain services to reduce defendant's income tax for 1927, amounting to $31,794.81, and orally agreed to pay plaintiff what the services were reasonably worth. The petition recited the services, the procuring of an offer of reduction to approximately $6,000, alleged the reasonable worth of the services as $1,000 and prayed judgment for that sum with interest from March 1, 1930.

Defendant answered that plaintiff was employed on condition that plaintiff was to represent him in his income tax matters until the completion thereof and he was to pay plaintiff a reasonable sum for the services only if no income tax was assessed against defendant; that plaintiff represented himself to be a person of good character, admitted to practice before the treasury department, whereas

plaintiff had been indicted in April, 1925, in the United States district court for Nebraska for devising a scheme to obtain money by false pretenses and had on November 30, 1928, been fined $200 therefor, and further, on September 22, 1925, had been complained of before the treasury department charged with fraud, the complaint asking his disbarment from practicing in income tax matters before the department; that the disbarment was pending until April 1, 1930, at which time the department found the charges to be true and recommended his disbarment from practice, whereupon, on April 21, 1930, said order was made final; that as a result of plaintiff's method of handling defendant's matters from December, 1929, to March, 1930, defendant was compelled to employ other accountants at great expense to ascertain the true situation with respect to his income taxes.

The evidence was in conflict. From each side evidence was received supporting the material averments of the pleadings. Plaintiff testified he had done all of defendant's accounting work and had been his business adviser since 1919; defendant told him, if he could reduce the tax, to handle it for him the best way he knew how to do it; the profits sought to be taxed consisted of approximately half a million dollars arising out of the sale of three motion picture theaters in Lincoln, but the payments therefor were spread over 14 years so that the present worth was thought by plaintiff to be all that was taxable. The taxable profits were first fixed by the government at $382,000. Defendant presents the fantastic theory that none of these profits were taxable. Plaintiff spent two or three months on the work and made trips to New York and Washington. He testified that he secured an offer of a reduction of the taxable profits to $150,000, which would make the income tax amount to about $6,000, that defendant refused to accept it, that he continued for a time to see if it could be further reduced, failing which he recommended defendant to accept the compromise; that defendant refused to take his advice and said he would get some other accountant to

handle it; that was in the latter part of March, 1930, and he turned the papers over to defendant in April, 1930. Later he sued for the reasonable value of his services.

Defendant testified in substance that the oral agreement was that he should pay the expenses but that plaintiff was to receive nothing unless he entirely defeated the tax, in which event he was to get a fee of $1,000. In this he was corroborated by another witness. Plaintiff testified that defendant agreed to pay him his expenses and whatever was fair and reasonable for the work and that there was no agreement that defendant should pay him $1,000 only if he succeeded in defeating the income tax entirely. Defendant paid the expenses only.

In this state of the evidence the question of plaintiff's right to recover was a question of fact for the jury. Unless there was error in the instructions or otherwise in the trial, the judgment must be affirmed.

Much is made of plaintiff's disbarment before the treasury department. There is evidence that plaintiff had turned the papers over to defendant in April, 1930, before this occurred and that it was not because of any disbarment or prospect thereof but because defendant was consenting thereto in the belief that other accountants could procure him further relief.

The court instructed the jury that, if "defendant employed the plaintiff to defeat said tax or to get a reduction thereof" and plaintiff honestly and faithfully proceeded with the work, he would be entitled to recover from plaintiff a reasonable sum for whatever he accomplished in that regard, provided he had completed his service before his disbarment. The succeeding instruction is the same except that it provides for recovery if defendant knew of the charges against plaintiff while representing defendant and had reason to anticipate that plaintiff would ultimately be disbarred thereon and yet continued him in his services and availed himself of the fruits of his labor. There was some evidence that defendant knew that charges were pending against plaintiff to disbar him from practice in

matters of this nature and that defendant continued to use his services, and there is evidence from which it may be inferred that he used the fruits of plaintiff's work to further his quest for a still greater reduction in his income tax assessment. We are of the opinion that the two instructions are not inconsistent and were not prejudicial to the rights of defendant. Taken as a whole the instructions were apt and had no tendency to confuse the jury on the issues.

Other objections relate to the refusal of the court to give instructions requested by defendant and to alleged errors in admitting testimony. We have examined these and think it sufficient to say that the jury were fairly instructed on all necessary phases and that there was no error in refusing instructions nor was there prejudicial error in the admission of testimony.

The judgment of the district court is

AFFIRMED.

KNOX COUNTY, APPELLANT, V. ROBERT S. COOK ET AL., APPELLEES.

FILED MARCH 23, 1934. No. 28889.

1. **Judges.** A county judge is liable on his official bond for trust funds coming into his hands by virtue of his office, which funds he has lost by reason of insolvency of bank in which he had deposited them, notwithstanding he may have acted in good faith and without negligence in the selection of a depository.
2. ———. County judge cannot set off against a claim for unreported fees the amount which he has paid as premium for his official bond, where no claim for such premium has been presented to and allowed by the county board.

APPEAL from the district court for Knox county: CHARLES H. STEWART, JUDGE. *Affirmed in part, and reversed in part.*

Arthur L. Burbridge, for appellant.

W. A. Meserve, Kennedy, Holland & De Lacy and *Montgomery, Hall & Young, contra.*

Heard before GOOD, EBERLY, DAY and PAINE, JJ., and LANDIS, District Judge.

GOOD, J.

This is an action against the principal and sureties on the official bonds of Robert S. Cook, as county judge of Knox county, to recover certain sums of money claimed to be due the plaintiff from Cook as unreported fees, and also for trust funds for which he has failed to account. Each of the defendants filed answers denying liability. The cause was tried to the court without the intervention of a jury, and it found for plaintiff as to certain unreported fees and for the defendants as to the trust funds. Plaintiff has appealed from the judgment in so far as it found for defendants as to trust funds in Cook's possession, and the sureties on the bonds have filed a cross-appeal from the refusal of the court to allow the county judge credit for premiums paid by him to the bonding companies for becoming sureties on his official bonds.

It appears that Cook has served several terms as county judge of Knox county. This appeal involves three terms of his office, with two different sureties on his bonds for the different terms.

The question of liability for trust funds arises out of the fact that Cook had deposited such funds in banks which became insolvent and thereby occasioned the loss for which recovery is sought. It is conceded that Cook acted in good faith and was not negligent in selecting the depositories. The trial court took the view that, since he was acting in good faith and was not guilty of any negligence in the selection of the depositories, he was not liable for loss occasioned by the insolvency of such depositories.

With respect to the liability of officials upon their bonds for funds coming into their hands by virtue of their office, the authorities are not harmonious. The United States supreme court and by far the greater number of the state

courts which have passed upon the question hold to the view that such officers are liable for any loss except that which is caused by the act of God or the public enemy, and that officials must account for funds lost in depositories which have become insolvent, unless such deposits were authorized by law. Counsel for defendants contend that a county judge should be placed in the same category as executors, administrators, guardians and trustees, and that the rule as to these is that they are not liable for loss of funds committed to their care and deposited in banks, unless they have been negligent in selecting the depository banks.

This court held in *Bank of Crab Orchard v. Myers,* 120 Neb. 84: "An administrator is not personally liable for funds of his decedent which he deposits in a bank and which are lost because of the bank's failure, unless he was negligent in selecting the depository." And such, we think, is the rule, supported by the great weight of authority, as to administrators, executors, guardians and trustees. However, the courts generally take a different view with reference to state and county officials, and the greater number of them hold to the effect that such officials are liable on their official bonds for the loss of any funds committed to their care by virtue of their office, except where the loss is occasioned by the act of God or the public enemy. For a half century this court has been committed to the doctrine of strict accountability.

In *Ward v. School District No. 15,* 10 Neb. 293, it was held that a school district treasurer was liable on his bond for funds lost through insolvency of a bank in which he had deposited school funds. It did not appear in that case that there was any question of bad faith or negligence in the selection of a depository.

In *State v. Sheldon,* 10 Neb. 452, this court held a county treasurer liable for public funds which had been stolen from him, and that the theft was no justification for failure of the treasurer to account for such funds.

In *Bush v. Johnson County,* 48 Neb. 1, a county treas-

urer and his sureties were held liable for public funds deposited by him in a bank and lost because of the bank's insolvency.

In *Thomssen v. Hall County*, 63 Neb. 777, it was held: "In this state a county treasurer is an insurer of the funds which come into his hands *ex officio*, and such treasurer and his bondsmen cannot, in an action by the county to recover funds not accounted for, plead that such funds were lost without any fault or neglect on the part of the treasurer, by the failure of a bank in which they were deposited for safe-keeping only, and in good faith, believing such bank to be solvent."

Since the rendition of these opinions the legislature has been in session many times and has not seen fit to pass any act which would relieve county judges from liability to account for funds, received *ex officio* and lost without any negligence of such official.

Counsel for defendants cite and rely to some extent upon the act of the legislature in providing for depositories for state and county funds. In more recent years the legislature has gone farther and provided for depositories for funds of treasurers of municipalities, townships and school districts, but thus far has failed to provide for creating any depository for funds held *ex officio* by county judges. In the absence of such legislation, this court is not warranted in extending to county judges the protection that the legislature has extended to state, county, municipal, township and school treasurers. Were the question an open one in this state, we might view with favor the contention that a county judge should not be held liable for the loss of funds, received by virtue of his office, deposited in a bank and lost because of its insolvency, where he had been diligent and careful in the selection of a depository. It is a matter of common knowledge that county judges, from time to time, may have large sums of money committed to their care, especially in condemnation proceedings, which funds remain in their custody for a considerable length of time pending final

settlement of the condemnation proceedings, and it seems a harsh rule to require them to be absolute insurers of such funds, but the remedy must be provided by the legislature, not by the court.

From the record it appears that through the insolvency of the Center State Bank of Center, Nebraska, defendant Cook lost trust funds to the extent of $963.96, and through the insolvency of the First State Bank of Winnetoon trust funds were lost to the extent of $353.29. Under the law as it now exists, he should be held to account for these items.

The cross-appeal presents the question as to whether a county judge should be allowed credit for the sums he has paid out as premiums on his official bonds, in this instance amounting to $421.50. Defendants assert that the same rule should apply to county judges as is applied to executors, administrators, guardians and trustees, and that these persons who give surety bonds are entitled to charge the premiums on such bonds to the trust funds as an item of expense. It must be observed that the bond of a county judge is not to secure payment of trust funds alone but for many other items, and that, while there is statutory authority for payment out of the general fund of premiums on bonds of county treasurers, there is no statutory authority for paying the premiums on the official bond of a county judge. It must be borne in mind that such premium, if paid, would be paid out of the county general fund. A county judge can draw upon that fund only when a claim has been allowed and a warrant duly issued. Had defendant Cook presented to the county board a claim for such premiums by him paid, whether the county board should have allowed such claim is not before us and is not decided. In the instant case, no claim was presented to the county board for premiums, and consequently none was allowed. In the absence of such allowance, there can be no question that he was not entitled to credit for these items against the fees which he had collected. The trial court rightly held that defendant Cook was not entitled to

offset against unreported fees a claim for premiums paid by him upon his official bonds.

The judgment of the district court, in so far as it denied defendant Cook credit for the premiums on his official bonds, is affirmed, and, in so far as it disallowed the claims for trust funds, lost through insolvency of banks, the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND REVERSED IN PART.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. COMMERCIAL STATE BANK, E. H. LUIKART, RECEIVER, APPELLANT: SCHOOL DISTRICT OF CITY OF CRAWFORD, INTERVENER, APPELLEE.

FILED MARCH 23, 1934. NO. 28899.

1. **New Trial**: NEWLY DISCOVERED EVIDENCE. The application for a new trial, by motion, because of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, is required by section 20-1143, Comp. St. 1929, to be made at the term the verdict, report or decision was rendered.
2. ———. After adjournment *sine die* of the term at which the judgment was rendered, the provisions of section 20-1145, Comp. St. 1929, are controlling as to statutory application for a new trial.
3. ———: MOTION: AMENDMENT. A motion for a new trial cannot be amended by assigning new grounds after the statutory time for filing such motion has expired, except upon a finding by the court that the party was unavoidably prevented from presenting the matter contained in the amendment.
4. **Schools and School Districts.** Even the action of a majority of a school district board will not bind the district, without notice to or participation therein of the other members.
5. **Appeal.** Estoppel not having been pleaded in the district court may not be urged on appeal as reason for reversal.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

F. C. Radke, Barlow Nye and *Crites & Crites*, for appellant.

J. E. Porter, contra.

Heard before GOOD, EBERLY, DAY and PAINE, JJ., and LANDIS, District Judge.

EBERLY, J.

The Commercial State Bank of Crawford, Nebraska, became insolvent, and a receiver therefor was appointed on November 20, 1931, in a proceeding had in the district court for Dawes county.

The school district of the city of Crawford intervened in this proceeding, and, upon trial, after issues were joined, was awarded a judgment for the sum of $3,262.27 as a trust fund, and the same was directed to be paid from the assets of the bank by the receiver in preference to claims classified as "general and valid preferred claims" of depositors. From the order of the district court overruling his motion for a new trial, seasonably made, and also from the overruling of an amendment to such motion for a new trial, the receiver appeals.

The judgment appealed from, amply sustained by the evidence then before the court, was rendered on the theory that this bank had not been approved as a depository by the governing body of such school district, as contemplated by the provisions of chapter 141, Laws 1931, and therefore the moneys so deposited constituted trust funds. This was in harmony with our previous decisions. See *State v. Midland State Bank*, 52 Neb. 1; *Lincoln Nat. Bank & Trust Co. v. School District*, 124 Neb. 538; *State v. Bank of Otoe*, 125 Neb. 414.

After this date further discoveries of facts were made by the receiver, the result of which is that the controlling questions in this case are presented by a record which discloses the following: The judgment allowing the intervener's claim as a trust fund was made and entered on January 27, 1933, that being one of the days of the regu-

lar October, 1932, term of the district court for Dawes county. Intervener's motion for a new trial was thereafter seasonably filed. The regular October, 1932, term of this district court was adjourned *sine die* on March 6, 1933. On March 14, 1933, an amendment to the motion for a new trial was filed, which added to the same an additional paragraph, numbered 8, as follows: "Newly discovered evidence which is material to this action and consists of written matter in the form of a post card being addressed to the Commercial State Bank, Crawford, Nebraska, and on the opposite side thereof shows that the school district on July 17, 1931, designated the defendant bank as the depository of the funds of the intervener school district of the city of Crawford. Said card being attached to the deposition of Georgia Owen which is filed herewith."

This post card is in words and figures as follows:

"Commercial State Bank, Crawford, Nebr.

"Dear Sirs: You are hereby notified that the school board of School District No. 71 of Dawes county, Nebraska, has designated and approved your bank as the depository of the funds of the above said school district until notified otherwise. Mr. A. F. Johnson of Crawford, Nebr. is the legally qualified treasurer of the school district. You will be advised in case of a change of treasurer. Yours respectfully, Georgia Owen, Dir. or Sec., Crawford, Nebr. Dated July 17, 1931."

The deposition of Mrs. Georgia Owen, of which this post card, exhibit 1, constitutes a part, was presented in support of the application for a new trial, and in substance sets forth that the deponent lived in Crawford, Nebraska; was a member of the school board of district 71, and secretary thereof; that on July 17, 1931, the blank card had been received from the county superintendent of that county; that on that day on her own motion she filled out and signed the same and delivered it to A. F. Johnson who was then the treasurer of that district. The evidence, however, affirmatively discloses that no district board

meeting was ever held which considered this subject, and that neither the district board nor the district ever selected or designated this bank as a district depository or authorized the execution of exhibit 1 by its secretary. It further appears, however, that the card was actually delivered by some person to the Commercial State Bank, while it was a going concern, though its presence was not discovered and its existence was unknown until after the judgment appealed from had been entered. Ample evidence as to reasonable diligence in the transaction on the part of the receiver and his subordinates is also disclosed by the proof. It further appears that on March 15, 1933, the receiver's motion for a new trial, as originally filed, and also as amended on March 14, was overruled. As presented at the bar of this court, appellant's challenge to the correctness of this action of the trial court is limited to that part of the judgment which overrules the amendment to the motion for a new trial filed March 14, 1933, which is based on newly discovered evidence, and a claim of estoppel based thereon. But it will be noted that the ground upon which appellant now relies to sustain his contention appears only in the amendment of March 14, after the adjournment *sine die* of the term in which the judgment sought to be set aside was rendered, and 46 days after its date.

We were early committed to the rule: "A motion for a new trial cannot be amended by assigning new grounds after the statutory time for filing such motion has expired, except upon a finding by the court that the party was unavoidably prevented from presenting the matter contained in the amendment within three days after verdict." *Davis v. Taylor & Son*, 92 Neb. 769. See, also, *Gullion v. Traver*, 64 Neb. 51; *Aultman, Miller & Co. v. Leahey*, 24 Neb. 286.

The statute (Comp. St. 1929, sec. 20-1143) requires that "The application for a new trial must be made at the term the verdict, report, or decision is rendered, and, except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable dili-

gence, have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented."

The term at which the judgment sought to be set aside was rendered had adjourned, as we have seen, prior to the filing of the amendment to the motion for a new trial, and the provisions of section 20-1145, Comp. St. 1929, were not complied with. Hence, the question upon which appellant relies was not presented by the record.

Furthermore, the facts disclosed by the showing negative the claim that the governing body of the district ever took any action whatever in the matter of designating a depository. The post card, exhibit 1, on which appellant relies, is naught but the unauthorized act of the secretary. It is not the result of the lawful action of the school district board. Even, "The action of a majority of a school district board will not bind the district, without notice to or participation therein of the other members." *People v. Peters*, 4 Neb. 254. See, also, *Thompson v. West*, 59 Neb. 677.

And, lastly, estoppel not having been pleaded in the district court may not be urged on appeal.

It follows that the judgment of the district court is correct, and is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. DENTON STATE BANK, APPELLEE: LOAN & FINANCE COMPANY, INTERVENER, APPELLANT.

FILED MARCH 23, 1934. No. 28890.

1. **Judicial Sales.** Successful bidder at judicial sale becomes a party, may appear and urge confirmation, or show cause why he should be released from his obligation, and may appeal from the order upon motion for confirmation.
2. **Banks and Banking: INSOLVENCY: SALE OF ASSETS.** It is the duty of bank receivers and trial courts to attempt to secure

highest possible price for assets of failed bank.

3. ———: ———: ———. Substantially increased offers to receiver for assets of failed bank before confirmation of sale to highest bidder at public sale are sufficient evidence to support a finding of trial court in exercise of its judicial discretion that confirmation should be denied and new sale ordered.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Bert L. Overcash and *H. B. Muffly*, for appellant.

F. C. Radke, G. E. Price and *William J. Gartland, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LANDIS, District Judge.

DAY, J.

This is an appeal from an order of the trial court denying confirmation of a sale of assets of the defunct Denton State Bank. Upon the application of the receiver, showing that the assets of the bank had been collected and reduced to cash as far as practical and also reporting that the remaining assets were worthless or of such doubtful value that a continuation of the receivership was not for the best interests of the depositors and other creditors, the court ordered that these assets be sold at public sale and fixed the time and notice of such sale. At this public sale, the Loan & Finance Company made the high bid of $550, which was reported to the court. It was also reported to the court that subsequent to the sale an offer of $650 was received, whereupon the Loan & Finance Company offered to pay $685 instead of the amount bid at the public sale. The report of the receiver stated that the depositors' committee did not recommend confirmation of the sale. The receiver did recommend confirmation. The Loan & Finance Company, the highest bidder at the public sale, which later raised its offer to an amount more than that made by another subsequent to the sale, appeals from the order denying confirmation. The appellant filed briefs

in this court and made an oral argument, while the receiver's attorney did not file a brief and did not argue the case, but stated in open court that to do so would be inconsistent with his recommendation before the trial court that the sale be confirmed. No objections were filed in the trial court by the depositors' committee or any one else. The order of the trial judge overrules the receiver's motion and denies confirmation without any finding of fact upon which the order was based. The appellant Loan & Finance Company insists that it is entitled to a confirmation of a sale to it by reason of an offer made in the interval between the public sale and the time when the matter of confirmation was before the court. Great reliance is placed upon *State v. American State Bank,* 122 Neb. 42. In the cited case, some real estate, the asset of a defunct state bank, was sold at public sale, and, on the date fixed for confirmation, the court ordered a resale in open court, whereupon a substantially higher offer was received and sale immediately confirmed. The high bidder at the public sale appealed, and this court, following the authority of *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.,* 51 Neb. 659, held that an order of the district court setting aside such a sale and ordering a resale is a final order affecting the substantial right of purchaser from which he may appeal. See, also, *Reece v. Cartwright,* 209 Ia. 706. A successful bidder at a judicial sale becomes a party, may appear and urge confirmation, or show cause why he should be released from his obligation, and may appeal from the order upon motion for confirmation.

In the *American State Bank* case, *supra,* the offer in open court was so much more than the bid at the public sale that it was evident that the amount bid was grossly inadequate. The appellant who bid much less was the only complainant. To have confirmed sale to him would have prejudiced the substantial rights of the depositors and other creditors of the insolvent bank. For an interesting discussion of the effect of receipt of advance bid before

confirmation upon the confirmation of a judicial sale, see notation in 11 A. L. R. 399.

However, it is not necessary that we reexamine the *American State Bank* case now, since this case does not present a similar situation. Here a subsequent offer was received from another, after which appellant increased his former offer almost 24.55 per cent. The appellant abandoned his bid made at a public judicial sale, and he then made a subsequent offer. These two subsequent offers, made after the sale and prior to confirmation, were evidence that the highest bid at the public sale was grossly inadequate. Such evidence might well cast suspicion upon the sufficiency of the last offer. It is the duty of bank receivers and trial courts to attempt to secure highest possible price for assets of failed bank. The court has much discretion as to the method of sale, and there are no restrictions upon the means by which the court may determine the adequacy of price. Even in sale of real estate at mortgage foreclosure, where the appeal is by the mortgagor, it has been said in *Lindberg v. Tolle,* 121 Neb. 25: "Under our statute the trial court passes on the regularity of foreclosure sales and the proceedings leading thereto. There are no restrictions upon the means by which that court may be satisfied that the land brought its fair value."

In several such cases, it has been held that a judicial sale will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake or to shock the conscience of the court. *First Nat. Bank v. Hunt,* 101 Neb. 743; *Frederick v. Gehling,* 92 Neb. 204. But in these cases, there was no evidence that others were willing to pay more.

Substantially increased offers to receiver for assets of failed bank before confirmation of sale to highest bidder at public sale is sufficient evidence to support a finding of trial court in exercise of its judicial discretion that confirmation should be denied and new sale ordered. Appel-

lant's later offer was in the nature of a private one, and it is not entitled, as a matter of right, to a confirmation of a judicial sale, and the record does not demonstrate that that discretion was abused in this case.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. COMMERCIAL STATE BANK OF CRAWFORD, E. H. LUIKART, RECEIVER, APPELLANT:
JOHN C. THOMAS, ADMINISTRATOR, INTERVENER, APPELLEE.

FILED MARCH 23, 1934. NO. 28897.

1. **Banks and Banking**: Where S. deposits money in bank for which certificate of deposit issues, relationship of debtor and creditor is ordinarily created between bank and depositor.
2. ———. This relationship is not changed to that of trustee and *cestui que trust*, because administrator of S. does not know of deposit and does not find certificate of deposit until informed years later by receiver of bank after its insolvency, even though bank, with knowledge of death of S. and administration of her estate, did not make voluntary disclosure that S. some years prior to her death had certificate which was nonnegotiable, but was assignable.
3. ———. Wrongful conversion of fund by bank and augmentation of its assets, essential elements to create trust fund, are not established by evidence in this case.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Reversed, with directions.*

F. C. Radke, Barlow Nye and *Crites & Crites*, for appellant.

R. R. Wellington, contra.

Heard before GOOD, EBERLY, DAY and PAINE, JJ., and LANDIS, District Judge.

DAY, J.

This is an appeal of the receiver of the defunct Commercial State Bank of Crawford from a judgment in favor

of an intervener, John C. Thomas, administrator of the estate of Susannah Spease, deceased, impressing the assets of the bank with a trust. Mrs. Spease, at the time of her death, held a certificate of deposit for $2,412.50. She had other certificates of deposit, a checking account in the bank, and a safety deposit box.

The administrator, shortly after his appointment in 1927, appeared at the bank and asked that all papers in the possession of the bank belonging to the estate be given to him and further inquired as to the amount of money in the bank belonging to the estate. He was informed as to the balance in the checking account and given the safety deposit box which contained other certificates of deposit but not the one involved here. This certificate of deposit was dated June 20, 1924, and its existence was unknown to the administrator. The estate was administered and distributed in 1928. In 1932 the administrator received notice from the receiver informing him for the first time about this certificate of deposit. He then found the certificate in an old satchel in an envelope with some canceled checks.

As far as the record indicates (evidence all stipulated) this was a demand certificate of deposit without an agreement to pay interest. Since it was issued in 1924, it was not negotiable (Comp. St. 1929, sec. 8-141, Laws 1923, ch. 191, sec. 39), but was assignable. Strictly neither the bank nor its officers knew and could not know that a certificate of deposit outstanding for about four years was still the property of deceased. The evidence does not disclose that they misled the administrator by any affirmative statement. If he was misled it was by their failure to disclose. The administrator contends that the bank occupied a fiduciary relation to the deceased and therefore had a duty to disclose. A fiduciary relation is not disclosed. Mrs. Spease had possession at all times of the certificate of deposit which was evidence that she was creditor and the bank her debtor. She was dealing with the bank on equal terms, and they were transacting only a banking

business. She did not leave the certificate with them nor does the record show that the bank had access to her safety deposit box in which she kept other certificates and other papers. The only relationship was that of creditor and debtor. *Citizens State Bank v. Worden*, 95 Neb. 53; *Harrison State Bank v. First Nat. Bank*, 116 Neb. 456. The bank had no legal duty to voluntarily impart information as to the certificate of deposit to the administrator. It is aside from the issues to discuss the moral and ethical duty of a banker who fails to disclose information to an administrator, which failure inures to the bank's benefit.

Even assuming that a duty of disclosure rested upon the bank and that a breach of that duty would amount to fraud, that is not sufficient to establish a constructive trust under the circumstances in this case. When Mrs. Spease deposited $2,412.50 in the bank and was issued a certificate of deposit, the relationship of debtor and creditor was established. The certificate represented the indebtedness of the bank. The same situation existed at the time of her death. If the administrator had known of the asset when the estate was probated, neither he nor the bank had the certificate in their possession at the time, and the bank was merely indebted to the estate. Were the assets of the bank augmented as held necessary in *State v. Farmers State Bank*, 121 Neb. 532? No. When did it cease to be a debt of the bank? When did it become a trust? Never. It was an ordinary general deposit when made, when Mrs. Spease died, and is still a deposit. Its character never changed. The judgment of the trial court is reversed, and the cause remanded, with directions to the trial court to enter a judgment that the claim is a deposit and as such a preferred claim, on a par with all other deposits.

REVERSED.

ADAM G. RENTSCHLER, APPELLEE, V. MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT.

FILED MARCH 23, 1934. No. 28768.

1. **Master and Servant:** COLLECTIVE AGREEMENT. "Collective labor agreement" and "trade agreement" are terms used to describe a bargaining agreement, as to wages and conditions of work, entered into by groups of employees, usually organized into a brotherhood or union, on one side, and groups of employers, or corporations, such as railroad companies, on the other side.
2. ———: CONTRACTS. Such a collective agreement, being a general offer, becomes a binding contract when it is adopted into, and made a part of, the individual contract of each employee. A breach of its terms will give rise to a cause of action by either party.
3. ———: ———: CONSTRUCTION. The terms of the collective agreement, as included in an individual labor contract, ought not to be construed narrowly and technically, but broadly, so as to accomplish its evident aims and protect both the employer and the employee.
4. ———: ———: ENFORCEMENT. An employee is not deprived of his right to seek redress in the courts because his contract of employment contained a provision providing a method of arbitration of disputes.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Kennedy, Holland & De Lacy, for appellant.

J. M. Patton and *Rosewater, Mecham, Burton, Hasselquist & Chew, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

PAINE, J.

This is an action brought to recover wages by a member of the Brotherhood of Maintenance of Way Employees against the Missouri Pacific Railroad Company, by reason of plaintiff being laid off at a time when he had seniority rights above an employee who was retained. The jury returned a verdict for $1,000.

Adam G. Rentschler, plaintiff and appellee, a member of

a bridge gang, was let out on account of a reduction of the forces. Plaintiff claims that this was contrary to, and in violation of, a written agreement, dated January 1, 1928, between the Missouri Pacific Railroad Company and the brotherhood to which he belonged, and that his seniority rights were superior to a member of the bridge gang who was retained in service. He therefore brought suit on said agreement, and claims as damages the loss of wages from the time he was let out.

The amended petition set out that plaintiff has for a long time been employed by the defendant railroad company as an iron worker in bridge gang No. 1, and that on September 13, 1930, he was discharged from service, while a member in good standing of the Brotherhood of Maintenance of Way Employees; that since January 1, 1928, there has been in full force and effect an agreement between the railroad company and the brotherhood, and certain paragraphs of said agreement are incorporated in the petition. That the seniority roster for the year 1930 listed the plaintiff, on January 1 of said year, and continuously until the time of his discharge, and after his name the date November 6, 1928, and listed W. Stone, another employee, as of March 1, 1929, such dates being their seniority under the written agreement, and plaintiff claims that under said roster he should not have been discharged until after W. Stone had been discharged. He alleges that he has fully complied with said agreement as to all hearings and appeals. That he is able and willing to continue in said employment, and that he has lost the salary he would have earned had he been retained according to the rules of seniority, as set out in said agreement. That, because of said unlawful discharge, he is now, on account of his age, forever barred from seeking future employment with any railroad company on account of the unlawful act of the defendant.

The amended answer admits the execution of the agreement January 1, 1928, between the carrier and the brotherhood; admits the employment of the defendant,

and his suspension on the date mentioned; alleges that W. Stone was the swing line man of a crew of a derrick car, and that, by custom and practice, the holder of such a position has not been subject to displacement on account of seniority by other workmen not trained in said capacity; admits that rule 3-a of said agreement provides: "When force is reduced, the senior man in the sub-department, on the seniority district, capable of doing the work, shall be retained." Defendant insists that plaintiff did not have the ability, training, and experience for the position of swing line man, and that the judgment of the defendant governed in such matters, and asks that the plaintiff's action be dismissed.

The defendant assigns as error the refusal of the court to direct a verdict for the railroad company, and the giving of instructions Nos. 2 and 8, and claims that plaintiff should not have resorted to courts until he had exhausted the arbitration plan of adjusting grievances provided in the contract.

The next proposition of law presented by the defendant is that a contract between a brotherhood and a railroad company does not establish a contract between the individual members of that brotherhood and the railroad company, a breach of which will sustain an action by the individual, and that mutuality is lacking between the parties to this suit.

The last proposition of law presented by the defendant for reversal is that if said agreement be construed as taking away from the management the question of the capability of an employee, and leaving the decision of that question with a jury, it is void as against public policy.

In the collective agreement between the union and the company, article 2 covers seniority, and rule 2 thereunder provides: "a. Seniority begins at the time the employee's pay starts. Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the railroad."

A large part of the evidence, as disclosed in the bill of exceptions of nearly 200 pages, relates to the duties of a swing line man on a derrick car. It is clear that the issue contested in the evidence was whether the company was justified in retaining Stone and letting Rentschler out. It appears from the evidence that the crew of the derrick car, consisting of the engineer, fireman and swing line man, are simply employees of the same bridge gang, and two of them are under the engineer, and that the balance of the bridge gang work on the side of the track, or on the bridge being constructed, or wherever the pieces of steel to be moved happen to be.

The evidence shows that Rentschler's seniority is superior to that of Stone's, and that plaintiff had on former occasions filled the position of swing line man on this identical derrick, and had long been employed as an engineer on derricks, having a swing line man and fireman under his charge, and was qualified to perform the duties of a swing line man in the position in which W. Stone had been retained by the company. This evidence was very hotly contested, and submitted to the jury, and the jury by their verdict decided this question of fact in favor of the plaintiff.

The trial court, in instruction No. 7, said: "You are instructed that, even though you find from a preponderance of the evidence that the plaintiff was capable of filling the job as swing line man, still you cannot find for the plaintiff if you further find that the railroad company in the exercise of a reasonable discretion had reasonable grounds for believing that the plaintiff was not capable of filling said position, and that Stone was the better man for the job."

The consideration of this case requires this court, for perhaps the first time, to pass on the rights of parties under a collective agreement. A trade agreement, or a collective labor agreement, is a term used to describe a bargaining agreement entered into by a group of employees, usually organized into a brotherhood or union, on

one side, and a group of employers, or a corporation, as a railroad company, on the other side. Such agreement may be a brief statement of hours of labor and wages, or, on the other hand, it may take the form of a book, as exhibit 2, furnished to plaintiff in this case, or often an exhaustive pamphlet regulating, in the greatest minuteness, every condition under which labor is to be performed, and touching upon such subjects as strikes, lockouts, walkouts, seniority, apprentices, shop conditions, safety devices, and group insurance. In France such agreements are treated as contracts, while in America they were at first considered as binding in morals, but not in law, and few attempts were made to bring them before the courts. In fact, the term contract was rarely applied to them because, the majority of unions being unincorporated, they could not be competent parties to a contract. It is said that government reports show that, of the larger labor unions in 1929, only 14 out of 148 of them were incorporated. The public has always been greatly interested in these agreements because their purpose was to sustain proper relations between capital and labor, and thereby tend to prevent strikes, lockouts, or walkouts.

While no two of such agreements are alike and the decisions rarely set them out at length, yet the purpose of these collective agreements was, in general, to regulate hours of work and wages to be paid, yet the individual members of a union, while protected on these questions, could stop work at pleasure.

But in the following examination of cases it will be found that in the last 20 years an increasing number of cases have been brought before our courts, a few by brotherhoods, not as many by employers' organizations, but the great majority of cases have been brought by the individual employee. Relief has been refused when the employee was a member of the union, and the collective agreement was made a part of his individual labor contract. On the other hand, relief has been granted when an employee was not a member of the union, and the collec-

tive agreement was, upon the slightest of evidence, considered as adopted into the individual's contract. The only conclusion is that the decisions of our courts are in hopeless conflict, but the questions involved are so important, and the issues at stake so vital, that courts must not shirk the responsibility of a painstaking research of all the facts and law in each case presented to them.

One of the earliest cases involving rights under a collective agreement was that of *Hudson v. Cincinnati, N. O. & T. P. R. Co.*, 152 Ky. 711, 45 L. R. A. n. s. 184, Ann. Cas. 1915B, 98, in which case an engineer was discharged for a violation of the rules and brought action alleging it was in violation of the collective agreement. The court advanced the theory that the engineer's rights hung on his individual contract, of which the collective agreement between the brotherhood and the railroad company was merely a memorandum of rates of pay and regulations, and that this collective agreement was simply an ingredient of his own individual contract of employment. This case was decided March 11, 1913, and while but three cases are cited in the text of the opinion, the only case set out at length was *Burnetta v. Marceline Coal Co.*, 180 Mo. 241, decided in 1904, being a case brought against a coal company in a justice court for $21.57 wages at $2 a day. The testimony showed that Burnetta when hired said he understood the rules of the mine, and under that mere statement defendant sought to prove the collective agreement, but the trial court excluded the agreement and the ruling was upheld on appeal, the court saying that the plaintiff's statement that he understood the rules could by no means be construed to mean an agreement to labor under certain rules, one of which allowed pay to be withheld for two weeks, and that a contract to work is not to be inferred from the simple fact that he was a member of the organization which entered into an agreement, because persons work for themselves and are free and independent, and an agreement can only be enforced when the entire proposition has been stated and by them freely ac-

cepted. The real question at issue was whether the collective agreement had been adopted by Burnetta when he was hired.

Coming down a little later, we find the case of *Piercy v. Louisville & N. R. Co.*, 198 Ky. 477, 33 A. L. R. 322, decided by Turner, the commissioner of appeals, in 1923. This opinion followed the usage theory. Conductor Stanfill had been employed for more than 15 years, and successfully sought a declaratory judgment that he was entitled, under his seniority rights, to a particular day run under the terms of his employment. The railroad was indifferent, and had complied with the request of the Order of Railway Conductors, of which Stanfill was a member, to apply the seniority rule in the collective agreement so that it would give Stanfill a night run. The court of appeals affirmed the declaration of the lower court on the ground, first, that the action of the company does not appear to have been considered, either by the company or by the Order of Railway Conductors, as being a general change or modification of the collective contract. The Order of Railway Conductors merely requested the company to ignore the individual rights of the plaintiff. In the text appears this statement:

"The primary purpose in the organization of labor unions and kindred organizations is to protect their individual members and to secure for them a fair and just remuneration for their labor and favorable conditions under which to perform it. Their agreements with employers look always to the securing of some right or privilege for their individual members, and the right or privilege so secured by agreement is the individual right of the individual member, and such organization can no more by its arbitrary act deprive that individual member of his right so secured than can any other person."

The fifth paragraph of the syllabus says: "A trade union is not the agent of a member for the purpose of waiving any personal right he may have, but only for the limited purpose of securing for him, together with all

other members, fair and just wages and good working conditions." And the sixth paragraph of the syllabus reads: "An agreement by a member of a trade union to abide by its by-laws, rules and regulations, and to comply with the will of the lawfully constituted majority, does not require a member to submit to the determination of the union any question involving his personal rights."

In *Hall v. St. Louis-San Francisco R. Co.* (1930) 224 Mo. App. 431, plaintiff recovered damages for his discharge in violation of a collective agreement. The court say: "We can see no impropriety in any person or corporation who employs a large number of men who are members of a labor union making and being bound by an agreement made with the representatives of a labor union for and on behalf of the members of that union such as was entered into between defendant and the union of which this plaintiff was a member;" and held that the contract was binding and plaintiff was entitled to the benefit of its provisions.

In *Yazoo & M. V. R. Co. v. Webb,* 64 Fed. (2d) 902, in the third syllabus of this case, decided by the fifth United States circuit court of appeals, it is held that the contract between the employer and the employee, fixing wages and working conditions, ordinarily leaves the employer and individuals free to enter into particular contracts of employment, but both parties to such particular contracts are bound by the general contract as to wages and working conditions.

In the text in this decision, speaking of collective contracts, it says: "As a safeguard of social peace it ought to be construed not narrowly and technically but broadly and so as to accomplish its evident aims and ought on both sides to be kept faithfully and without subterfuge."

In itself, the collective contract is rarely subject to a court action because it is incomplete. It establishes no concrete contract between the employer and any employee. No one is bound thereby to serve, and the employer is not bound to hire any particular person. It is only an agree-

ment as to terms on which contracts of employment may be satisfactorily made and carried out. It is a mutual general offer, to be closed by specific acceptance. When negotiated by representatives of an organization, it is called collective bargaining, but ordinarily the laws of the order do not require the members to serve under it, but only that if they serve they will do so according to its terms.

When the collective agreement is published by the managers, it becomes then the rule of that industry. The agreed seniorities must be observed in promoting, laying off, and reemploying men.

When an employee brings into court a case concerning his individual rights under such an agreement, a question may be raised whether his employment comes under it.

In *Gary v. Central of Georgia R. Co.*, 37 Ga. App. 744, decided in 1928, a member of the Brotherhood of Locomotive Engineers, an unincorporated union, finally accumulated 90 demerits for blocking and delaying trains, and was automatically discharged, according to the rules. He brought suit against the company for $30,560. The company hired the plaintiff on a written contract, in which was included the rules of the Brotherhood of Locomotive Engineers, and although the contract made through the brotherhood was presumably a collective agreement, it was held that the petition stated a good cause of action.

One of the late cases is *Yazoo & M. V. R. Co. v. Sideboard*, 161 Miss. 4, released April 20, 1931. Charles E. Sideboard, a colored man, entered the employ of the railroad as a freight brakeman October 1, 1910, and worked four years, when he was transferred to passenger service, and served as porter and brakeman from 1914 to 1928. He objected at first to being paid only the wages of a porter while performing duties of a brakeman, but cashed the checks. For the last year he refused to cash the checks, and demanded pay of a brakeman. The time has at last arrived, said the court, when labor union contracts are no longer construed with hesitancy and strictness, but

are accorded the same liberality which is given to other agreements, so that while a few years ago courts were holding that an individual member of a labor union could not maintain an action for the breach of an agreement, as in the *Hudson* and *Burnetta* cases, the holdings now are that these agreements are primarily for the individual benefit of the members of the organization, and that rights secured by these contracts are individual rights, which may be enforced directly by the individual, citing *Gulla v. Barton*, 149 N. Y. Supp. 952; *Blum & Co. v. Landau*, 23 Ohio App. 426; *Cross Mountain Coal Co. v. Ault*, 157 Tenn. 461. This *Sideboard* case goes a step farther and involves the question of whether the appellee, who, being a negro, could not be a member of the union which made the the contract, but who had been governed in accordance therewith, could rely upon and sue for its benefits; in other words, is he, as a third person, such a stranger to it that he can have no enforceable rights under it? The court said that the contention that a third party may recover directly on a contract made expressly for his benefit is not an open question in this state, since *Canada v. Yazoo & M. V. R. Co.*, 101 Miss. 274. Many cases are cited on this subject in the notes, 13 C. J. 703-711; 6 R. C. L. 882-890, secs. 271-277; 2 Elliott, Contracts, sec. 1412; *Smyth v. City of New York*, 203 N. Y. 106. The reasoning of these cases is this: First, when the terms of the contract are expressly broad enough to include the third party, either by name, as one of a specified class, or, second, where the third party was evidently within the intent of the terms so used, such party will be within its benefits, if, third, the promisee had, in fact, a substantial and articulate interest in the welfare of the said third party in respect to the subject of the contract.

In *West v. Baltimore & Ohio R. Co.*, 103 W. Va. 417, the court refused relief to a dissatisfied carman who brought action on seniority, not only because his claim had been rejected by the union, but also because he was not shown to be within the collective agreement, there being

no evidence that he voted for or ratified the contract under which he claimed seniority rights.

In the Canadian case of *Young v. Canadian Northern Ry.*, 4 D. L. R. 452, plaintiff machinist, after working seven years, was discharged in violation of the seniority rule established between the American Federation of Labor, to which he did not belong, and the railroad. The Manitoba Kings Bench, being the trial court, admitted that defendant, and probably the union, intended the rules of the collective agreement to apply to all of the workmen. Nevertheless, the court rejected plaintiff's claim on the ground that the union never assumed to speak for him, a nonmember.

In *Whiting Milk Companies v. Grondin*, 282 Mass. 41, an agreement between a union and the employer, preventing employee from selling dairy products, as the servant of another, to employer's customers for 90 days from cessation of employment, is held binding on a milk wagon driver who worked under the agreement as a member of the union.

Recently in several cases the theory has been advanced that a collective agreement is a valid contract. *Ribner v. Racso Butter & Egg Co.*, 238 N. Y. Supp. 132. There is good ground for the adoption of this conclusion, for the parties on each side, through their organizations as agents, have bound themselves to certain specific rights and duties, and Dean Roscoe Pound stated, in an address at the American Bar Association in 1919: "Human interests will assert themselves continually in new ways and significant institutions of every-day life often arise extra-legally and produce their most important results independent of or even against the law." American Bar Reports 1919, p. 453.

A still more recent case, decided December 14, 1932, is *Panhandle & Santa Fé R. Co. v. Wilson*, 55 S. W. (2d) (Tex. Civ. App.) 216. Here Wilson, a pumper at Littlefield, Texas, sued the company for wages lost during the period between his discharge and reinstatement. The

court held that, even though the employee was working under the terms of the trade agreement, he did not have a good cause of action because his discharge had been in accordance with its terms.

The field of inquiry on collective agreements has been carefully studied by several of the leading law writers, and enriched by their articles. Those which have been examined may be found in 10 St. Louis Law Review, 1; 41 Yale Law Journal, 1221; 44 Harvard Law Review, 572; 9 Ind. Law Journal, 69; 18 Va. Law Review, 185. Other citations, which cannot be referred to without making this opinion unduly long, are: *Keysaw v. Dotterweich Brewing Co.*, 105 N. Y. Supp. 562; *Saulsberry v. Coopers International Union*, 147 Ky. 170; *St. Louis, B. & M. R. Co. v. Booker*, 5 S. W. (2d) (Tex. Civ. App.) 856; *Langmade v. Olean Brewing Co.*, 121 N. Y. Supp. 388; *Gregg v. Starks*, 188 Ky. 834; 16 R. C. L. 425, sec. 10.

The claim is made on behalf of the railroad company that the contract is void for lack of mutuality, yet Nebraska has gone as far as any court in protecting a third person's rights under a contract, and if this court had taken the other view, and considered it only in the light of third person beneficiary, the case of *Cooper v. Bane*, 110 Neb. 74, has held: "A contract for the benefit of a third person may be enforced by him, although it is not made in his name and the consideration does not move from him; in other words, the real party in interest may identify his interest in the contract and enforce the same accordingly, and the facts relating thereto may be proved by parol evidence."

It is insisted on the part of the defendant that plaintiff, by submitting his grievance to arbitration, was bound thereby, and could not appeal to the court. It is claimed that, after several hearings on this matter, the last hearing reached by plaintiff resulted in a tie vote, and thereupon the plaintiff sought to protect his rights by bringing this action.

In the case of *Bell v. Western Railway*, 153 So. (Ala.)

434, it was said (quoting from *Western Assurance Co. v. Hall & Brother,* 112 Ala. 318): "The principle declared in these cases (*Bozeman v. Gilbert,* 1 Ala. 90, *Meaher v. Cox,* 37 Ala. 201, and *Wright v. Evans,* 53 Ala. 103) is that, when the agreement to arbitrate includes the whole subject-matter of difference, so that the right of the party to resort to the courts of his country for the determination of his suit or claim is absolutely and effectually waived, such an agreement is against public policy and void. We adhere to that conclusion. The courts clearly distinguish between an agreement which refers to arbitration the extent or amount of damages to be recovered, but leaves the parties free to have the right to recover or liability of the other party determined by the courts, and those agreements which refer to arbitration the authority to determine the right of the one to recover, or the liability of the other. The former are upheld and enforced, while the latter are declared to be against public policy and not binding. The policy of the legislatures of this state is to encourage the settlement of legal controversies by arbitration as far as can be done without contravening some principle of public policy. *Tankersley v. Richardson,* 2 Stew. (Ala.) 130; *Tuskaloosa Bridge Co. v. Jemison,* 33 Ala. 476."

Section 13 of the Nebraska Bill of Rights says: "All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." This point has been before our courts several times in reference to insurance policies and other similar contracts providing for arbitration, and in *National Masonic Accident Ass'n v. Burr,* 44 Neb. 256, this court stated in its opinion the following rule: "Whatever may be the rule elsewhere it is now the firmly established doctrine here that though the parties to a contract provide that if a dispute arise between them that such dispute shall be submitted to arbitration, refusal to arbitrate or no arbitration is not a defense to

an action brought on such a contract by one of the parties thereto, as the effect of such agreement is to oust the courts of their legitimate jurisdiction and is contrary to public policy and therefore void. This was the rule announced in the *German-American Ins. Co. v. Etherton,* 25 Neb. 505. It was followed in *Union Ins. Co. v. Barwick,* 36 Neb. 223, and again reaffirmed in *Home Fire Ins. Co. v. Bean,* 42 Neb. 537."

The jury found from the evidence that plaintiff was as well qualified to handle the job as Mr. Stone. The contract between the union and the railroad company was limited to just one year, and therefore expired at the end of a year, and plaintiff could only recover for that period, and the evidence shows that he could have earned over $1,500, but the jury returned a verdict of only $1,000, which is sustained by the evidence.

We have examined the instructions given the jury, as well as considered all of the assignments of error, and we find no reversible error therein. The judgment of the trial court is

AFFIRMED.

ROSE, J., dissents.

P. C. TOEWS, APPELLEE, V. WILLIAM SCHLITT, APPELLANT.

FILED MARCH 23, 1934. NO. 28895.

Evidence examined, and judgment of the trial court affirmed.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

J. E. Willits, for appellant.

W. M. Whelan, contra.

Heard before GOOD, EBERLY, DAY and PAINE, JJ., and LANDIS, District Judge.

PAINE, J.

This is an action for the foreclosure of a mechanic's

lien. There is no question of law involved, and not a single citation of authority is made in either brief. The questions involved must be determined entirely from the evidence, to ascertain the proper amount of the recovery.

A house belonging to appellant, William Schlitt, located at 218 East A street, in Hastings, Nebraska, had the roof blown off by a tornado on May 9, 1930. The Pauley Lumber Company made an offer to repair the house for $1,222, and the owner of the property in his answer says that when he told this to contractor P. C. Toews, appellee, he agreed to do the work necessary to repair and improve the house, and make it in the same condition it was before the tornado, for $1,000. Appellee denies this, and says that he agreed to do it for the same price as Pauley Lumber Company, to wit, $1,222. The owner of the house says that he paid appellee $400 in cash and paid for material used by him $550.87, making a total payment of $950.87, leaving a balance on the agreed price of $49.13, and charges that many things that should have been done were not done at all.

The owner testifies that the house was built in 1918, and that the tornado knocked the roof over in front, knocked it down in the center, blew the window-lights in, and the plaster down, and moved the east wall in. Such a disaster would doubtless involve hidden structural defects, and make it next to impossible to improve the house from the condition it was in before the tornado, as alleged.

It is very rare that one finds a case where the principals differ so absolutely as they do in this case as to nearly every item under the contract, including the total price. The principal differences relate to whether the contractor did not entirely abandon the job, and whether certain painting was not entirely left out by the contractor. There is also a question whether even now the house is not bent in the middle as a result of the tornado, and that this should have been straightened out by the contractor as a part of his contract.

The appellee insists that the trial judge patiently

listened to all the evidence, and properly considered every item that was proved in the evidence, and that the final judgment is right.

It appears that appellee Toews first came to the house and finally estimated that $1,400 was the amount due from the insurance company carrying the tornado insurance; that he then came down nearly every evening for a week, and the matter was talked over for hours at a time, but no contract was drawn, and the court is left to evolve what the contract probably was from all this evidence, including a study of the 27 exhibits. Each party was honestly impressed with certain details which the other party entirely failed to remember, as is usual in such cases, and proof is lacking as to the final and definite meeting of minds, not alone on the total contract price, but on each detail. It would have saved endless dispute and hard feelings if this contract had been reduced to writing in even a crude fashion.

Judge Blackledge, who tried the case October 11, 1932, gave it most careful consideration until he rendered judgment on January 27, 1933, finding from the evidence that a total amount of $950.87 had been paid, but that there was a further credit which must be allowed on account of unfinished work, which should have been done under the contract, in the sum of $38.13. He also found that the contract price was for $1,222, and not $1,000, and that there was a balance of $233 still due, with interest, and directed that if said sum was not paid the property should be sold according to law.

This court is unable to find any error in the disposition made of the case by the trial court, and therefore the judgment is

AFFIRMED.

IN RE ESTATE OF PHILIP CROSBY. CHRISTOPHER CROSBY, APPELLANT, V. ELIZABETH JOHNSON ET AL., APPELLEES.

FILED MARCH 23, 1934. No. 28798.

1. **Wills.** Where an application is made to probate a carbon copy of a purported last will and testament which has not been found, and on the trial a witness is produced who testified, without contradiction or impeachment, that the deceased during his lifetime destroyed said last will and testament in his presence, with intention of revoking it, the verdict of the jury that said deceased left no last will and testament at the time of his death will be affirmed.
2. **Evidence.** It is not prejudicial error in a will contest to ask a mental expert, who had previously testified as to the effects of chronic alcoholism upon the mind of a patient, if in his opinion such patient was in sufficient mental condition to understand reasonably business affairs, and those to whom he was naturally obligated, or to know and understand about his property and his obligations reasonably toward those having lawful claims upon him, in case he should die and his property would have to be disposed of.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

S. L. Winters and *J. J. Krajicek*, for appellant.

Anson H. Bigelow, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

BEGLEY, District Judge.

One Philip Crosby departed this life at Omaha, Nebraska, on March 16, 1932. After his death a diligent search was made for a purported last will and testament which it was claimed he executed during his lifetime. No will was found, but a carbon copy of a purported will, executed before S. L. Winters, an attorney, was obtained and filed for probate, the petition stating that the original will had been lost, mislaid or destroyed by some one other than the testator. Objections were filed to the probate

thereof, and the probate court, after a hearing, duly admitted said copy to probate as a copy of the last will and testament of said deceased. An appeal was had to the district court, where objections were filed by certain heirs at law, wherein they denied that said instrument was properly executed or properly attested, and that said original, if any, was destroyed by the said Philip Crosby, with the intent to revoke the same, and that said testator was not possessed of sufficient mental capacity to make a will by reason of long-continued use of intoxicating liquors to excess. Upon a trial the jury found for the contestants and that said deceased left no last will and testament at the time of his death. From a judgment upon said verdict the proponent has appealed.

The purported will was executed on August 9, 1930, and was drawn by S. L. Winters, one of the subscribing witnesses. After executing the will, the testator retained the same in his possession, but same was not found in his possession after his death. On the trial the contestants produced a witness, Orden Anderson, who testified that he was well acquainted with Philip Crosby during his lifetime and saw him almost daily the last few weeks before his death, in fact, he was with him at the time he passed away; that about seven or eight days before he died the deceased called him in and requested that he give him a big envelope that was in the dresser drawer; that he did so, and deceased then took out a piece of white paper from the envelope and opened it and said, "This is my will. I have not treated my sisters right, so I will just destroy it." And he took and tore it into bits of paper and threw it in the slop jar that he had alongside his bed. No attempt was made to refute this testimony by any other witness and it stands uncontradicted.

The burden of proof was upon the plaintiff to prove that, during his lifetime, Philip Crosby executed a last will and testament, and that at said time he was mentally competent to do so, and that the exhibit offered in evi-

dence as such will was an exact copy thereof and that the same was not revoked by the said Philip Crosby during his lifetime. The presumption is, where a person has made a will and has retained possession of the same and after his death it is not to be found or located, that same has been destroyed or otherwise disposed of by the deceased for the purpose of revoking such instrument as his last will and testament.

In this case this presumption is supported by positive evidence of an eyewitness to the transaction that the deceased did destroy his said will with the purpose of revoking it and the verdict is supported by ample evidence.

The evidence in the trial court discloses that for many years previous to his death the testator indulged in the excessive use of intoxicating liquors and was for a time confined as a patient in St. Bernard's Hospital for chronic alcoholism. Dr. Ash, an expert in nervous diseases and in charge of deceased while a patient at said hospital, stated: "When admitted to the hospital he gave evidence of having been addicted to the use of alcohol for a prolonged period of time. The symptoms that he presented at that time suggested chronic alcoholism, and those symptoms were rather in reference to change in his intelligence, showed evidence of deterioration, also changes in his mood; he was quite irritable, and also some changes in memory, memory defects." When he was dismissed from the hospital, the doctor testified: "As far as his mental condition is concerned, it remained practically the same." The doctor's opinion as to the effect of chronic alcoholism and the mental changes described above was then asked in the following questions: "Q. What would you say, Doctor, as to his condition during that time and when he left the hospital, his mental condition, as to whether he would be in sufficient mental condition to understand reasonably his business affairs and who naturally he would have obligations to; would he be sane about matters of that kind? A. I would have to reach a

conclusion, largely,—a man in the state of chronic alcoholism, they are partially orientated as to time and place. They will lack,—in this condition they don't appreciate the deterioration that has taken place, and there is more or less indifference, irritability, fault finding, and usually following lines of least resistance; chief concern appears to be getting something to drink, and being indifferent to any other circumstance. Q. What would be your opinion as to whether he would be able to form reasonable conclusions or opinions as to matters concerning his business or his obligations to those who might have claims upon him? A. My opinion would be that he was not able to exercise good judgment in transacting business. * * * Q. Now, if we can get, Doctor, a little more definitely what your opinion is, as to whether in his condition at the time he left that hospital, and was under your treatment there, he would be in a mental condition to know and understand about his property, and what his obligations would reasonably be towards those who would have a right to have claims upon him in case he should die and his property would have to be disposed of; what would be your opinion of his ability to form sane opinions along that line? A. I would say that he would be indefinite to any circumstance of that sort."

The appellant and proponent claims error in the admission of this testimony of Dr. Ash as to the mental capacity of the deceased and his ability to transact ordinary business. In view of the showing that the will had been revoked and destroyed, said matters do not become material in this case, but we see nothing objectionable in such testimony. The doctor was testifying as to the effects of chronic alcoholism on the mental capacity of a patient and merely gave his opinion as to the ability of such person to transact business and to know and keep in mind the objects of his bounty and the persons who would have a right to expect to receive his property.

Our court has held in *In re Estate of Gunderman*, 102

Neb. 590, that an inexpert witness cannot give her opinion as to the mental capacity of testatrix unless such opinion is based solely on facts relating to the conduct and action of testatrix as detailed in the evidence of the witness, but our court has not held that an expert witness may not give his opinion as to the mental capacity of a testator, based upon mental disease, and his conduct arising therefrom.

It is held that a witness who is a competent physician or surgeon may state facts known to qualified members of his profession as to the effect, extent and tendency of professional knowledge regarding the effects of intoxicating liquors or condition of mind of a human being. 22 C. J. 543.

In *Glass v. Glass*, 127 Ia. 646, it is said: "The true mental condition of a person cannot be understood by the trier unless the degree of his capacity be in some way disclosed. And the opinion of the witness that the person was capable of transacting ordinary business, and of intelligently disposing of property, is no more than a statement of his opinion as to his real mental condition."

It is true that it takes less mental capacity to make a valid will than to make contracts, but the court properly instructed the jury as to the term "testamentary capacity."

However, we think the admission of this evidence could in no wise prejudice the rights of the proponent, as to the existence of a valid will at the time of the death of the testator.

In view of the evidence, we conclude that the judgment is the only one that could have been entered in the case, and therefore the same is

AFFIRMED.

WALTER A. SCOTT, APPELLEE, V. NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

FILED MARCH 30, 1934. No. 28774.

Insurance. Untrue answers in an application for a disability benefit contract, attached to a life insurance policy, will avoid the contract where they relate to the physical condition, and the personal medical history of the applicant of facts well known to him and material to the risk, and when, if the truth had been told, the contract would not have been issued.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed.*

William Baird & Sons, Reginald Foster and *George Hoague,* for appellant.

Brogan, Ellick & Van Dusen, W. A. Stewart, Jr., and *Robert B. Hamer, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

PAINE, J.

Plaintiff brought action against defendant on supplemental agreements for monthly payments of $50 each, allowed for permanent disability, on two policies of life insurance, written in the amount of $5,000 each, dated July 18, 1928, upon each of which the annual premium was $94.50 a year; plaintiff at the time of the issuance of the policies being 21 years of age. Verdict was for $971, for which judgment was entered.

Plaintiff alleged that on May 1, 1931, he had become totally physically incapacitated, due to disease of his right testicle, and although he had made repeated demands upon the defendant, they had refused to pay the amount due.

The defendant for answer admitted the issuance of the two policies of $5,000 each upon the life of the plaintiff, and admitted that supplemental agreements were thereto attached, providing for monthly payments in case of total physical disability.

The defendant alleged that said policies of insurance were secured through false and fraudulent representations and warranties and concealments of material facts, in that plaintiff represented that he had never had any serious illness or disease, and had not been afflicted with, nor ever suspected of having, tuberculosis, or any disease of the genito-urinary organs, and that the only illnesses or disease which he had had since childhood consisted of a mild attack of influenza in 1918 and of chicken pox in 1915, and that he had never undergone a surgical operation, and defendant's exhibit No. 5 shows that he made such answers over his own signature to the medical examiner at Gothenburg upon July 7, 1928. That he had not consulted a physician within five years; that such representations and warranties were false, and knowingly made with intent to deceive, and that the defendant relied upon such representations and was deceived thereby to its injury. That within a year preceding the procurement of said supplemental agreements, the plaintiff had had a serious illness, and had tuberculosis, and defendant asked that the cause of action be dismissed, and that the agreements as to disability benefits, as set out in plaintiff's petition, be adjudged forfeited, void and unenforceable.

The plaintiff testified that he was solicited to purchase said insurance by L. A. Burson, local agent of the defendant company, at Gothenburg, Nebraska; that he had worked at farm work, planting and plowing corn and putting up hay, and had worked as a clerk in a grocery store, and worked on the block line in an automobile factory in Detroit, and had worked for a couple of months in a furniture house in Los Angeles, but that since May 1, 1931, he had been physically disabled from performing any work.

Dr. Edwin Davis, surgeon, a rather unwilling witness for defendant, testified that on November 25, 1927, the plaintiff first called at his office in Omaha for an examination, having been sent to him by his local physician in Gothen-

burg for a swelling in the scrotum; that on January 16, 1928, he returned for a reexamination, and upon the next day he was operated on in the hospital for epididymectomy, which is an operation for the removal of the epididymis, and in that operation he removed one of plaintiff's testicles because of its tubercular condition.

The facts support the conclusion that, 5 months and 20 days prior to the day of plaintiff's answer that he had not consulted a physician, his left testicle, having become tubercular, was removed, and he remained in the hospital thereafter for some days. He can scarcely be held to have forgotten this operation when he made these answers. His present total disability is due to a tubercular right testicle, being for the exact disability he concealed in his answers to the defendant.

The principal reliance of the appellant for reversal is based upon the answers made by the plaintiff as to his previous health in the application, which answers are alleged to be false, and that the agreements to pay disability benefits were procured by the concealment of material facts as to plaintiff's previous health and his false warranties and representations made in securing the same.

In the case of *Morrissey v. Travelers Protective Ass'n*, 122 Neb. 329, this court had before it an application in which the question was asked, "Is your eyesight impaired?" to which the insured made answer, in his own handwriting, "No," and admitted on the trial that he had a traumatic cataract of the left eye, which destroyed practically all of the sight therein. His defense is that, when he came to filling out this question, he asked the member of the defendant company who was soliciting him for the application what his answer should be, and that the friend told him, "Since you can see all right, the answer should be 'No,'" and that such answer was not a warranty, but a representation not material to the risk. If a truthful answer had been made by the plaintiff, the policy would never have been issued, and a directed ver-

dict for the defendant company was sustained in this court.

Section 44-322, Comp. St. 1929, reads in part as follows: "No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty deceived the company to its injury."

Representations that the applicant has had no medical attention in the five years preceding, and has never received or applied for treatment at any hospital, are representations that are material to the risk, so that their falsity invalidates the policy. *Minsker v. John Hancock Mutual Life Ins. Co.*, 254 N. Y. 333, 81 A. L. R. 829. In the notes to this case in the A. L. R. appears a full discussion of every phase of this subject, supported by abundant citations of authority.

In the case of *Muhlbach v. Illinois Bankers Life Ass'n*, 108 Neb. 146, we find a reversal of a judgment for plaintiff, based upon fraud in that the insured denied in answer to a question, that his parents or sister had ever been afflicted with insanity, which was false, and it is stated that untrue answers in reference to matters of opinion or judgment will not avoid a policy if made in good faith and without intention to deceive, but if such untrue answers are shown to be within the knowledge of the applicant, and are material to the risk, such answers will avoid a policy. In this and other cases it is material to examine the question whether, if a true answer had been made, the policy of insurance would have been written. *Souza v. Metropolitan Life Ins. Co.*, 270 Mass. 189; 4 Cooley, Briefs on Insurance (2d ed.) 3293; *Stanulevich v. St. Lawrence Life Ass'n*, 228 N. Y. 586.

We are convinced, from an examination of the record and the briefs, that the statements were made by the insured as written, and that they were false; that the defendant company was thereby deceived by such untrue

answers, made knowingly by the insured, on points material to the risk, and that the company relied thereon to its damage; that, if truthful answers had been made about his own personal medical history and physical condition, the supplemental agreements would not have been issued.

REVERSED AND REMANDED.

AGNES A. ROH, A MINOR, BY W. F. ROH, HER FATHER AND NEXT FRIEND, APPELLANT, V. JOSEPH OPOCENSKY, APPELLEE.

FILED MARCH 30, 1934. No. 28797.

1. **Evidence**: RES GESTÆ. *Res gestæ* means "things done" at the transaction being investigated. It includes not only the facts and circumstances, but also declarations made under the immediate spur of, and as a part of, the main transaction.
2. ———: ———. Spontaneous exclamations, uttered impulsively, and so closely connected with the transaction as to exclude the idea that they were made with deliberation and purpose, are properly admitted as *res gestæ* evidence.
3. ———: ———. The *res gestæ* declarations of an agent are clearly admissible against his principal if made while he is engaged in the business of the principal.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Reversed.*

Frost, Hammes & Nimtz and *Frederick L. Wolff*, for appellant.

Kennedy, Holland & DeLacy, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

PAINE, J.

This is an action for damages for personal injuries suffered as a result of an automobile overturning. The jury returned a verdict for the defendant.

Plaintiff and appellant, Agnes A. Roh, who brings this

action through her father, was 17 years of age when she was injured while riding in a new Willys Six automobile driven by appellee's wife on a dirt road near Abie, Butler county, Nebraska, upon June 29, 1931. This was prior to the time the present guest law statute became effective in Nebraska, and, therefore, the law in force at that time only required the plaintiff to prove ordinary negligence.

It was charged in the petition that defendant's wife was an inexperienced driver, and was negligent in the following particulars: That she drove the car at a rate of speed greater than was reasonable and proper, and at such speed as endangered the life and limb of the plaintiff, and while going at such a rate of speed the automobile swerved from side to side, and that the driver, acting in utter disregard of prudence, removed her hands from the steering wheel, and acted in complete neglect of the safety of the plaintiff. That the automobile upset and came to rest on its top, and that plaintiff suffered permanent injuries to her nose, upper jaw, skull, brain, nervous system, digestive and generative organs; that her upper lip was deeply cut; that she was permanently scarred and disfigured; and that she suffered many other injuries, all as set out in the petition. The answer admits that the defendant owned the Willys Six automobile; denies the other allegations contained in the plaintiff's petition; and alleges that the defendant's wife, as a gratuity and for the pleasure of the plaintiff, was taking her to a certain church, and that the accident which occurred was an unavoidable accident, and not the result of negligence.

In the assignment of errors it is contended that the trial court erred in giving certain instructions, and in the refusal of the court to allow the introduction of certain *res gestæ* evidence.

In examining the error alleged in regard to the refusal to admit the *res gestæ* evidence, the evidence of Mrs. Helen Stava, who was sitting immediately behind the driver, discloses that Mrs. Opocensky, the defendant's wife, who was driving the car, got out of the car after

the accident and began to talk right away. "Q. How soon after Mrs. Opocensky left the car did she begin to speak? A. She was saying right there, 'My God, I killed you'—(interrupted). Mr. DeLacy: Wait a minute; you know better than that. The witness: Do I? The Court: When objection is made, don't answer the question." This discloses that Mr. DeLacy was addressing the witness instead of the court, and the record does not disclose that any legal objection whatever had been made by him.

"Q. 73. And what was the first thing that she said? Mr. DeLacy: Objected to as hearsay, incompetent, irrelevant and immaterial. The Court: I will sustain the objection. * * * Q. 75. Well, where was your father's car at the time you got out? A. Where was my father's car? Q. Yes. A. When I was crawling out of the door I saw it coming over the hill, and then he drove right on up and jumped off the running board and came up towards the car. Q. And what time with reference to that did Mrs. Opocensky get out of the car? A. What time? Q. How soon, when with reference to that? A. She was out of the car when my father came. Q. Well, when was this time she began to talk with reference to the time your father arrived? Did she begin to talk before your father arrived? A. Yes; she talked some before then, but after he did, too. Q. I am not concerned with what happened after he came up, but what I am asking now is how soon it was after the car turned over and you got out that she got out and began to talk? Mr. DeLacy: Objected to as immaterial. The Court: I don't see the materiality of it. Q. What did she say there? Mr. DeLacy: Objected to as immaterial and hearsay. The Court: Objection sustained. Mr. Wolff: We offer to prove by the witness on the stand the answer would be as follows: (263) 'She says, "Oh, my God! Mrs. Roh, here I was trying to give you a thrill, and I have just about killed you; what will I do?" and she was terribly excited; she says, "I wasn't going fast, I was just going to give you a roller-coaster thrill on the hill."' "

When the driver of the car was on the witness-stand, the plaintiff endeavored to draw out this statement upon cross-examination, and the record made was as follows: "Q. 1036. Did you, Mrs. Opocensky, say that—(interrupted). Mr. DeLacy: Wait a minute. He is trying to get in a conversation that is improper, and it is not proper cross-examination. The Court: Well, I cannot tell. He may ask the witness if she didn't say a certain thing, expecting to meet that later on in rebuttal. Mr. DeLacy: What he is going to ask now has nothing to do with any impeachment. The Court: I will sustain the objection as not proper cross-examination and immaterial. Mr. Wolff: I would like to complete the question. The Court: No—make your offer. Mr. Wolff: Plaintiff offers to show, if the witness were permitted to answer, she would say that at that time she said, 'Oh my God! Mrs. Roh, here I was trying to give you a thrill, and I have just about killed you; what will I do? I wasn't going fast, I was just going to give you a roller-coaster thrill on the hill; and now, here, you are going to be in bed, and doctor bills.'"

1. *Res gestæ* means "things done" at the transaction being investigated, and includes not only the facts and circumstances of the occurrence, but also the declarations made under the immediate spur of, and as a part of, the main transaction. *Collins v. State,* 46 Neb. 37.

Whenever the bodily or mental feelings are material, the expressions are the natural reflexes of what it might be impossible to show by other testimony.

Res gestæ may be said to be the act speaking for itself, not what bystanders say when telling about the act. *Res gestæ* embraces all those circumstances which are the undesignated incidents of, and illustrative of, the main act. The lapse of time between the occurrence and the utterance may be more or less, provided the declaration is connected with and caused by the event and tends to explain it, and is not made as an afterthought.

"Since this utterance is made under the immediate and

uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts." 3 Wigmore, Evidence, sec. 1747.

2. The principles of evidence governing the admission of *res gestæ* have been broadened and developed by an effort to afford the triers of fact all reasonable means of ascertaining the truth, instead of withholding from them all information possible by the rigid application of certain rules of exclusion. The question is not now, how little, but how much, logically competent proof is admissible. 10 R. C. L. 975, sec. 158; *Stukas v. Warfield-Pratt-Howell Co.*, 188 Ia. 878; *Roach v. Great Northern R. Co.*, 133 Minn. 257; *Commonwealth v. Gardner*, 282 Pa. St. 458; *Ward v. Lane*, 189 Ala. 340; *State v. Evans*, 89 W. Va. 379.

Res gestæ, although in fact hearsay evidence, is admitted because it is so closely connected with the main transaction as to be a part of it. Spontaneous exclamations, uttered impulsively, and so closely connected with the transaction as to exclude the idea that they were made with deliberation and purpose, are properly admitted as *res gestæ* evidence.

"As independent explanatory or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury." *Hatzakorzian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 41 A. L. R. 1027.

3. The question is raised whether the *res gestæ* statements of defendant's wife while using or demonstrating this new car can be received in evidence against him.

Courts have gone far along this line, for in an early

case it was held that even the remarks made by a bystander at an auction sale of negroes could be introduced as *res gastæ*. *Stovall v. Farmers & Merchants Bank*, 8 Smedes & Marshall (Miss.) 305, 47 Am. Dec. 85.

The statement of a truck driver immediately after striking a bicyclist, and while yet at the scene of the accident, that he was hurrying and did not see the boy until he was right on him, was held part of *res gestæ*. *State v. Trimble*, 315 Mo. 166. See *Armour & Co. v. Industrial Commission*, 78 Colo. 569.

The *res gestæ* declarations of an agent are clearly admissible against his principal if made while he is engaged in the business of the principal.

A suit brought by plaintiff's mother for injuries received by her in this same accident has already been passed upon by this court. Chief Justice Goss in that opinion, *Roh v. Opocensky*, 125 Neb. 551, set out all the details of the accident, and they will not be repeated here. He also set out this court's ideas in regard to the law of the case, and held that this same statement was admissible as a part of the *res gestæ*, the statement in his opinion reading as follows:

"Under the principles announced in *Ridenour v. Lewis*, 121 Neb. 823, and *Perry v. Johnson Fruit Co.*, 123 Neb. 558, what Mrs. Opocensky said on the occasion was admissible as a part of the *res gestæ*. In such a situation, spontaneous declarations by an agent constitute a part of the fact in the *res gestæ* and have whatever probative value the jury may give to them as against the principal. They constitute an exception to the rule as to hearsay evidence.

" 'Statements made as part of *res gestæ* are substantive evidence of matters stated.

" 'Driver's declaration that he knew he was driving fast, made while injured plaintiff was being removed from automobile struck by driver, *held* admissible as *res gestæ* against owner of automobile.' *Duncan v. Rhomberg*, 236 N. W. 638 (212 Ia. 389)."

The court's refusal to admit this evidence, which was proper *res gestæ*, is reversible error.

REVERSED AND REMANDED.

BEGLEY, District Judge, having died March 4, 1934, did not participate.

WILLIAM J. SLOAN ET AL., APPELLANTS, V. FILLMORE COUNTY, APPELLEE.

FILED MARCH 30, 1934. No. 28826.

Taxation. Under sections 77-1503 and 77-1601, Comp. St. 1929, the board of equalization of Fillmore county was right in refusing to reduce the assessments upon 16 tracts of farm land in June, 1932.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Waring & Waring, for appellants.

J. W. Hammond, Thomas J. Keenan and *Grady Corbitt, contra.*

Heard before ROSE, GOOD, EBERLY and PAINE, JJ., and MEYER, District Judge.

PAINE, J.

William J. Sloan and 15 other owners of farm lands used only for agricultural purposes, which were included within school district No. 75, embracing the city of Geneva, which has a population of 1,800, filed before the board of equalization of Fillmore county, upon June 16, 1932, their complaints in writing, alleging that their farm lands were assessed for the purposes of taxation at an excessive valuation, and upon June 24, 1932, the said board of equalization found against the petitioners; from which an appeal was taken to the district court, which refused to grant the plaintiffs and appellants any relief, and dismissed their petition.

Plaintiffs allege that the question is of general interest to all of the farm owners in said school district, and that the petition is filed on behalf of the 16 plaintiffs and all other farm owners in said school district similarly situated. It is further alleged that a rate of taxation has been for many years, and in all reasonable probability will continue to be, required and levied, which will produce annually a tax on said land within said school district materially higher than that on other contiguous and near-by lands which are outside of said district, but are substantially like the lands of petitioners in all other respects and elements of value. Paragraph 8 of said petition reads as follows: "That since the lands of the petitioners were last valued for taxation purposes, the supreme court of Nebraska, in the case of *Schmidt v. Saline County*, 122 Neb. 56, has held that the tax condition now existing on farm lands in city and village school districts should be considered by the board of equalization in fixing the values thereof, and that the net income derivable from real estate, prudently used for the purpose for which it is best adapted, is a proper factor to consider in determining its actual value; that under this rule the valuations now on petitioners' lands should be reduced to the extent of the difference of the tax burden between petitioners' lands and contiguous and near-by lands not within said school district;" and the petitioners pray that the trial court will reduce the valuations of petitioners' lands, and all other lands within said school district, 25 per cent., or such other per cent. as will bring the valuations into uniformity with the valuations of other lands in said school district.

In the answer filed by the defendant, Fillmore county, after making a specific denial of the allegations of the petition, it is alleged that the mill levy of school district No. 75 has been drastically lowered in the last few years, and in all probability the same will be further lowered and materially reduced in years to come; that said district has no bonded indebtedness, contemplates no new or

added improvements; that the present mill levy of school district No. 75 is only 10 mills, and that said levy is not confiscatory nor unreasonable, and does not tend to lower the selling price of land in said school district when due consideration is given to the benefits of owners or residents of the land located in said district; that all of the land in said district, including that of the petitioners, was assessed at its actual value as defined by the statutes of Nebraska, and that the same was fixed at a uniform and fair basis, and denies that this case is governed by the case of *Schmidt v. Saline County*, 122 Neb. 56, and alleges that the situation and facts are entirely different from the Saline county case.

Plaintiffs in their brief state that the appellants were called to the stand, one after another, and testified that their lands were agricultural lands, and compared their lands with lands immediately outside of school district No. 75, and testified that, by reason of the school taxes in said district, the fair and reasonable value of their property was reduced from 15 to 30 per cent., and no serious attempt was made to dispute this proposition. Tabulations of farm lands in and outside of school district No. 75 were made, and from these many tracts of land it was shown that the average tax per acre of farm lands in school district No. 75 was $1.31; that the average tax of similar agricultural lands outside of school district No. 75 in said county was 64 cents an acre; that the average assessed valuation of petitioners' lands in school district No. 75 was $82.33 an acre; that the average assessed valuation of farm lands outside of school district No. 75 was $76.16 an acre; that the average quarter-section of farm land within school district No. 75 is $209.60, and the average quarter-section of land outside of school district No. 75 pays the taxes of $102.40.

At the conclusion of the evidence the court found that the assessments complained of should not be reduced, and dismissed the complaint at the cost of petitioners.

It is stated by counsel for petitioners that, because of

the opinion in *Schmidt v. Saline County*, 122 Neb. 56, they advised their clients that they could get relief from their high taxes, and that the two cases are absolutely analogous, and no other opinion is cited as authority in the brief.

On the other hand, it is claimed in the brief of the appellee, Fillmore county, that the Geneva school district No. 75 had only a levy of 10 mills in 1932, while the Friend school district had 17 mills, and that school district No. 75 of Geneva has no bonded indebtedness, no registered warrants, and had on hand at the time of the trial over $20,000 in cash, and that no improvements were contemplated; that the highest tax paid on a quarter by any of the appellants is $214.56, while in the *Saline County* case a tax of $350 was paid on a single quarter; that the average tax per acre in the Geneva district is $1.30 an acre, while it was shown in the *Saline County* case that it was $2.19 an acre, and that, when it is remembered that the appellants' lands are in a modern, 12-grade high school district, the difference is not so great as to require courts to grant a reduction. The contention of Fillmore county is that the evidence in this case falls far short of showing anything like the same conditions that were shown in the *Saline County* case. It is insisted that the evidence shows that the Geneva school is efficiently and economically managed, and has, for its enrollment, standing, and number of pupils, one of the lowest mill levies in the state of Nebraska, and that the holding in the *Saline County* case does not make it mandatory upon courts to reduce the valuation of lands when they are slightly higher than lands in an adjoining school district.

The record in the case at bar does not show, as the *Schmidt v. Saline County* record did, that the board of equalization failed to consider the school levy as one of the elements in fixing the assessed valuation of appellants' land.

This case is founded upon the assessed values of these farm lands for the single year 1932, and complaints were filed before the board of equalization upon June 16, 1932, and hearing was had thereon upon June 24, 1932, and the claim of the appellants was rejected. The evidence being confined to the one year, 1932, there was no evidence showing a reduction in value over a period of years.

Section 77-1503, Comp. St. 1929, provides: "The total assessed value of any real property * * * shall not be changed except when all the real property of the county is assessed, unless its value is changed by reason of altered conditions." Section 77-1601, Comp. St. 1929, provided that all real property should be assessed in 1926 and each four years thereafter. Therefore, the year 1930 was the year when all the assessed values could be changed by law. 1932 was not the proper year to seek to change the assessed valuation upon these 16 farms, and the board of equalization, finding no altered conditions which required relief in 1932, properly refused to grant any relief that year. While section 77-1601, Comp. St. 1929, was amended in 1933 (Laws 1933, ch. 130), that could not affect the plaintiffs' relief hereunder.

For a further discussion of the points involved, reference is had to the case of *Power v. Jones,* p. 529, *post.*

It is clear that the law contemplates an appeal to the board of equalization by landowners only in the year when all the real property of the county is assessed, except in the case of new improvements, or destruction thereof, or other special circumstances, which are not shown in the record before us. There being no error in the record, the judgment of the trial court is

AFFIRMED.

MYRON W. POWER, APPELLEE, V. JAMES O. JONES ET AL., APPELLANTS.

FILED MARCH 30, 1934. No. 28893.

1. **Taxation.** Where the claim is made that real property is assessed too high, the taxpayer should first apply for relief to the board of equalization, as provided in section 77-1702, Comp. St. 1929, and if relief is there denied, he should appeal to the courts.
2. ———. The claim that real property is assessed too high cannot be made for the first time in a collateral attack against the collection of the tax.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

T. F. A. Williams and *Joseph S. Wishart*, for appellants.

Beghtol, Foe & Rankin, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LANDIS, District Judge.

PAINE, J.

The plaintiff filed a petition for the foreclosure of tax liens held by him, founded upon a tax sale certificate and delinquent taxes paid as subsequent taxes to said tax sale certificate, the original certificate being in the sum of $205.40, and the four subsequent years of 1927 to 1930, inclusive, being for a face amount of about $798.77, with interest at 12 per cent., said taxes covering the west half of the southwest quarter of section 4, township 8, range 8, in Lancaster county, Nebraska.

To this petition Mary Elizabeth Bratt, Lourene Bratt Wishart, and Joseph S. Wishart, administrator of the estate of John P. Bratt, filed an amended answer, setting up that John P. Bratt was the owner of the property described in the petition and sold the same to James O. Jones, taking back a note and mortgage in the sum of $9,000 upon the property described in the petition; that, prior to the taxes covered by the tax certificate owned by the plaintiff in this case, school district No. 8 was formed

in Lancaster county, commonly known as the Bennet school district, and included approximately seven sections adjoining the town of Bennet, having about 450 population. That in 1922 a school building was constructed in Bennet, costing approximately $70,000, and bonds were issued for the purpose of paying therefor. That because of the erection of said school building, and the burden imposed by the bonds issued in payment thereof, the 80 acres set out in the petition were taxed heavily in excess of lands located in adjoining country school districts. That during the period from 1926 to 1930 the tax upon said 80 acres ran from $2.46 an acre to $2.68 an acre, a part of which was an assessment running from 18.9 mills to 20.3 mills for the Bennet school district, while adjoining land located in school district No. 40, being of the same quality and character, was taxed for school purposes from 2.6 mills to 3.1 mills annually, the result being that the 80 acres set out in the petition was taxed at approximately $200, whereas adjoining lands of similar quality, lying adjacent to it in school districts Nos. 79 and 40, were taxed at approximately $50 for 80 acres, and that in another nearby school district, i. e., No. 31, 80-acre tracts were taxed at approximately $52, and the same was true of 80-acre tracts of land, similar in kind and character, lying in adjoining country school districts. That, as a result of such excessive and exorbitant tax burden, the fair average rental of said land is and was so largely reduced as to be disproportionate to the income from similar farm land in adjoining districts. That because of such tax burden the value of said farm land is 50 per cent. less on the open market than similar land lying outside the district, and that such condition has existed for approximately ten years. That said tax is and was confiscatory of the income, so that the owner was unable to pay the interest charges on the mortgage thereon and the taxes.

Plaintiff alleges that the taxes represented in plaintiff's tax sale certificate, and subsequent taxes paid thereon, are

illegal and void, and in violation of section 1, art. VIII, and section 3, art. I of the Constitution; that they do not create, and have never created, any lien upon said real estate, and are subordinate, inferior, and junior to the mortgage owned by these answering defendants upon said 80-acre tract, and ask that the court so determine.

James O. Jones and wife, Clara, file a separate answer, setting out that they are the owners of the 80 acres described in the petition, and that they mortgaged said land to John P. Bratt for $9,000, the same being a purchase money mortgage thereon, and the said answering defendants, Jones and wife, allege similar facts in relation to the taxes in the Bennet school district as compared with the taxes on farm lands lying without said district, and that the farm lands within the district are taxed too high, and that for that reason the school taxes upon their 80 acres of land are illegal and void, and the tax sale certificate of plaintiff which includes said school taxes of the Bennet school district is illegal and void, and pray that the trial court will so declare.

Trial was had, and the decree and judgment of the lower court was for the plaintiff upon his tax liens, and holding that the school district taxes levied, as set out in the plaintiff's petition, were not void, but at most were voidable, and foreclosure was granted upon the tax liens, as prayed.

In 1915 the legislature passed an act for the purpose of allowing rural school districts to join together and include sufficient real estate within their district to warrant the issuing of bonds and the building of a high school. This consolidation of several school districts allowed rural high schools to be established at points where the same were demanded and permitted, such district to collect tuition for all pupils attracted to said high school from adjoining school districts. The proceedings leading up to these matters were had in accordance with sections 79-901 to 79-905, Comp. St. 1929.

The tax sale certificate in suit was issued for the taxes

of 1926, which were delinquent after May 1, 1927, and were sold at public tax sale held November 7, 1927.

The assessing authorities are required to make valuation once in four years of all real estate, as of April 1, by section 77-1601, Comp. St. 1929. This section provides that all real property shall be assessed in 1926 and each four years thereafter. While this section was amended in 1933 (Laws 1933, ch. 130) to require all real property to be assessed every two years, that amendment does not affect this case.

Section 77-1503, Comp. St. 1929, provided that such valuation shall not be changed except when all the real property of the county is assessed, unless for altered conditions, which is not alleged in this case.

"When the tax is void, either because the person assessed was not subject to taxation, or because it was assessed for an unlawful purpose, or without compliance with provisions of law imposed, it can be recovered back or treated as void in proceedings to enforce payment of tax." *Moffitt v. Reed*, 124 Neb. 410.

If a tax or assessment is levied without authority of law, it is, of course, void. This sometimes arises when the levy is made without a compliance with the jurisdictional requirements. It might also arise when there was no tax which the plaintiff was in equity bound to pay; as, for instance, where a city attempted to levy taxes upon property outside of its boundaries. If a tax is absolutely void, the taxpayer may, if not guilty of laches, invoke the aid of the court to protect his rights. *Touzalin v. City of Omaha*, 25 Neb. 817; *Rothwell v. Knox County*, 62 Neb. 50; *Wiese v. City of South Omaha*, 85 Neb. 844; *Hemple v. City of Hastings*, 79 Neb. 723.

I have been unable to find a decision in Nebraska holding that if an assessment was too high the tax would be absolutely void. In cases where property is assessed at a higher proportion of its actual value than other property similarly located, the taxpayer should first apply to

the board of equalization to correct any errors therein. This appears to be a prerequisite to bringing legal action. *Medland v. Connell,* 57 Neb. 10; *Western Union Telegraph Co. v. Douglas County,* 76 Neb. 666; *Hahn System v. Stroud,* 109 Neb. 181; *Philadelphia Mortgage & Trust Co. v. City of Omaha,* 65 Neb. 93; *Schmidt v. Saline County,* 122 Neb. 56; *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 28 A. L. R. 979; *Meridian Highway Bridge Co. v. Cedar County,* 117 Neb. 214.

The school district of Bennet has since its enlargement conducted an accredited high school of 12 grades. The voters must have determined that they desired such a school. It has attracted a number of pupils from near-by districts, for which this district has drawn $108 tuition annually for each pupil so attending, amounting to over $3,000 annually. To carry on such a fine school plant requires money, but there are compensating benefits in having such a school in your own district. If the expense of conducting this high school has become excessive, relief should be sought first by having the local school-board cut down expenses and lower the school levy.

No proper steps were taken by the owner of this property, either after the assessment of the property for the year 1926 or 1930, to bring his complaint of the high assessment of his land before the board of equalization in June of either year, as provided in section 77-1702, Comp. St. 1929, and, if relief was denied, to appeal therefrom to the district court, in accordance with section 77-1705, Comp. St. 1929, and the question cannot be raised in a foreclosure of a tax lien based upon taxes against which the property owner failed to take any of the legal steps provided by our Nebraska law. There being no error in the record, the judgment of the trial court is

AFFIRMED.

ETTA TYLER, APPELLEE, V. ESTATE OF MARY A. MCDOUGAL, APPELLANT.

FILED MARCH 30, 1934. No. 28847.

1. **Witnesses: COMPETENCY.** Section 20-1202, Comp. St. 1929, excludes as incompetent, with certain specified exceptions, the testimony of one having a direct legal interest in the result of the suit, concerning transactions or conversations occurring between the witness and the deceased person, as against the representative of the latter.
2. ———: ———. Where claimant testifies that she bought real estate at judicial sale for the decedent for $1,500 and that she and the decedent paid for the land and that she had not been repaid, it is a transaction with a deceased person, and, in a suit to recover it back, is not properly admitted in evidence, under section 20-1202, Comp. St. 1929.
3. ———: ———. Section 20-1202, Comp. St. 1929, does not apply where the transaction or conversation was not between the claimant and the deceased person, but between the latter and a third party, in which the claimant took no part. But where the claimant participated in the conversation, he is barred by the statute from testifying to any part thereof.
4. **Evidence** examined and *held* to be insufficient to support a verdict.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Reversed.*

Harry R. Ankeny and *Raymond B. Morrissey,* for appellant.

Armstrong & McKnight, contra.

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

CARTER, District Judge.

The plaintiff in this case filed a claim against the estate of Mary A. McDougal, deceased, alleging that she loaned Mary A. McDougal the sum of $500 in her lifetime that had never been repaid. The answer filed was a general denial. At the conclusion of plaintiff's testimony, the defendant rested its case and both parties moved for a directed verdict. The trial court sustained plaintiff's

motion and entered judgment for the full amount prayed for. From an order overruling defendant's motion for a new trial, defendant brings this appeal.

The main questions involved are whether the trial court erred in his rulings on the admissibility of certain evidence, and whether the evidence is sufficient to sustain a verdict.

The record shows that the claimant was called as a witness and was permitted to testify, over objection as to its competency, that the husband of Mary A. McDougal was the owner of certain real estate at the time of his death which was subsequently sold at judicial sale; that the claimant purchased said lands for $1,500 for the benefit of Mary A. McDougal, and that she and Mrs. McDougal took the money to the bank to pay the heirs, and that she and Mrs. McDougal paid for the land. It is the contention of claimant that the $500 sued for was paid by her as a part of the $1,500 purchase price.

Section 20-1202, Comp. St. 1929, provides in part: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness."

The following quotation from the case of *Montague v. Thomason,* 91 Tenn. 168, was quoted with approval by this court in the case of *Kroh v. Heins,* 48 Neb. 691, and applies to the case at bar: "A written transaction with or statement by a deceased person is no more a matter about which the adverse party may testify than a verbal transaction or statement. The statute makes no distinction. Its prohibition, on the contrary, is general, not limited to transactions and statements of one kind or the other, but comprehending both. No transaction with or statement by a deceased person is excepted, but all such are included." Upon both principle and authority we are constrained to hold that the above testimony was with

reference to a transaction with a deceased person and within the prohibition of the statute.

Other objections complained of relate to conversations alleged to have been had by Mrs. McDougal and her attorney, Lewis C. Westwood, and overheard by claimant. The claimant testified that Mrs. McDougal went to the office of Mr. Westwood, at which time they had a discussion regarding the purchase price of the lands involved, in which claimant says she did not participate. The record, however, discloses that claimant did participate in the conversation, a portion of which is as follows: "Q. Now, Mrs. Tyler, to direct your attention, what did Mrs. McDougal say to Mr. Westwood, if anything, about where she got the money to pay for the land? A. And Mr. Westwood,—Mrs. McDougal said to Mr. Westwood if the land went over $1,500 that she didn't have the money and she said that she would lack $500, and Mr. Westwood asked me if I would loan Mrs. McDougal the $500. Q. What did you say? A. And I said, 'Yes.'"

The theory on which the above testimony was admitted was that it was a conversation between the deceased and a third person. We think the rule is correctly set forth as follows: "Certainly in any event the transaction or communication with the deceased concerning which an interested party may testify must in reality be one between the deceased and a third person, in which the witness took no part, either passively or actively; if it is in fact a transaction between the witness and the deceased, his testimony will be inadmissible, though he took no physical part therein." 28 R. C. L. 500, sec. 87. The conversation as related by the claimant clearly shows that she participated in it and for that reason it could not be properly received in evidence. While Mrs. Tyler testified that she was not a party to the conversation, this is a mere conclusion on her part that is not borne out by the evidence.

The case did not go to the jury, and it might be said that the trial court did not consider the incompetent evi-

dence. In fairness to the trial court, we must say that he did strike from the record part of the testimony objected to. However, with the incompetent evidence herein mentioned stricken, the judgment of the trial court cannot be sustained because of an insufficiency of the evidence to support it. None of claimant's witnesses, other than herself, ever heard the sum of $500 mentioned. Their evidence was vague and uncertain as to any fact indicating a loan. They had no knowledge of the amount or of the time, place and circumstances of a loan. The record discloses that Lewis C. Westwood could have related most of the facts in establishing this claim if a proper claim did in fact exist. He was not called as a witness, though the evidence discloses that he was present in the courtroom when the case was tried. The amount of the loan was alleged to have been made in bills of small denominations, there being no receipt taken for the same. The evidence also shows that less than two weeks prior to her death, Mrs. McDougal placed $430 in the possession of Mrs. Tyler, the claimant, with instructions for her burial in case of death. It appears that she contemplated an early death and was careful to make all arrangements therefor, yet there is not a word with reference to a loan from Mrs. Tyler remaining unpaid. The record also shows that Mrs. McDougal had $2,000 in cash at the time of the purported loan. It is also disclosed by the record that claimant purchased the lands mentioned and subsequently conveyed them by quitclaim deed to Mrs. McDougal, which deed recites that said conveyance was in consideration of $1,500, the receipt of which is hereby acknowledged. It would seem very improbable that claimant would reconvey the land to Mrs. McDougal under the circumstances set out, without receiving some evidence of her indebtedness. These facts all lead us to the conclusion that the judgment is not supported by the evidence, especially since there was not a single competent witness who was able to fix the amount of the alleged loan. This court is committed to the rule that the

evidence, to establish a parol contract in this class of cases, must be clear, convincing, unequivocal and satisfactory, and that such evidence must be referable solely to the contract as made. Clearly the proof in this case does not come within the rule.

For the reasons herein contained, the judgment of the trial court is reversed and the cause remanded.

REVERSED.

MARTHA HANSEN, APPELLEE, V. ESTATE OF MARY A. MCDOUGAL, APPELLANT.

FILED MARCH 30, 1934. No. 28848.

1. **Witnesses**: COMPETENCY. When proper objection is made under section 20-1202, Comp. St. 1929, it is error, in an action to recover for services rendered to a decedent, to permit claimant to testify that she was present at decedent's residence a great deal of the time, that during that time decedent was in very poor health and for about three years before she died was almost helpless, and to detail the ailments with which decedent was suffering and describe her condition and amount of care required, though claimant did not testify directly as to the services she rendered, and though other witnesses who saw decedent were able to testify to the same matters.
2. **Appeal**. Where, in an action against the representative of a deceased person, testimony is offered in evidence that is incompetent under section 20-1202, Comp. St. 1929, but objection to its incompetency is not made, the objection will be treated as waived and will not be considered on appeal.
3. **Instructions** examined and *held* to be free from prejudicial error.
4. **Evidence** examined and *held* sufficient to support the verdict of the jury.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Harry R. Ankeny and *Raymond B. Morrissey*, for appellant.

Armstrong & McKnight, contra.

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

CARTER, District Judge.

In this case, Martha Hansen, as plaintiff below, sued the estate of Mary A. McDougal, deceased, for services rendered Mary A. McDougal in her lifetime over a period of 852 days preceding the date of her death, and which she alleges was of the reasonable value of 35 cents a day. The jury returned a verdict for the plaintiff in the sum of $298.20. From the overruling of his motion for a new trial, the executor of the estate brings this appeal.

The first question to be determined is whether the trial court erred in permitting Martha Hansen, the claimant, to testify that deceased was, during the last three years of her life, crippled and sick; that she could not get hold of things for the reason that her hands were all knotted up with rheumatism; that she was not always able to do her own ironing, nor was she always able to do her own housework.

We are of the opinion that the above testimony is within the prohibition of section 20-1202, Comp. St. 1929, which provides in part: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." The reason for the application of the statute to the facts above set out is well stated in the case of *Northrip's Adm'r v. Williams*, 100 S. W. (Ky.) 1192, as follows: "In *Newton's Ex'r v. Field*, 98 Ky. 186, the plaintiff * * * was permitted to testify as to the character of the services rendered by her, and their value, and the condition of the health of the decedent, and the trouble she had in waiting upon her. In ruling that this evidence was incompetent and prejudicial, the court said: 'The facts established by the appellee were made the basis of her recovery, and if the creditor can make the estate

of one dead his debtor, by establishing upon his own testimony a state of facts arising from transactions had with the decedent, and from which the law will imply a promise to pay, then the mischief intended to be remedied by this provision of the Code remains in all such cases, and a recovery allowed on the testimony of the plaintiff.' It is true appellee did not testify directly as to the services she rendered, but the court permitted her to detail the ailments with which Mrs. Northrip was suffering, and to describe minutely her condition. From this evidence the jury naturally and reasonably inferred that the witness was frequently with and in attendance upon the deceased, whose condition rendered it disagreeable and onerous to wait upon her. After hearing her evidence touching these matters, the jury could not well escape the conclusion that she herself rendered the service she related as being necessary in attending upon the deceased. That she was making evidence for herself, enhancing the value of her services, and impressing the jury with the fact that she should be well paid, there is not much room to doubt. * * * If appellee's evidence conduced to establish her claim, or tended to influence the jury in fixing the amount that should be allowed, it was incompetent and prejudicial. That it had this effect we have no doubt." We are therefore constrained to hold that the evidence of appellee hereinbefore quoted is concerning a transaction with a deceased person and within the prohibition of our statute thereon.

It is necessary, however, that proper objections to the competency of the evidence be made at the trial before prejudicial error can be predicated thereon in this court on appeal. The record discloses that the defendant objected to two questions only on the ground that they were incompetent and on both occasions the trial court properly sustained the objections. All other objections made were on the ground that the answers were not responsive to the questions or that the questions called for a conclusion of the witness. The objections as made will not preserve

the error contended for by appellant that the evidence was improperly admitted over objection to its competency. In our opinion the defendant waived its statutory right to have this evidence excluded by failing to make proper objections at the trial in the lower court. We therefore hold that the trial court did not err, under the circumstances of this case, in overruling the objections made to the admission of the testimony complained of by defendant.

Appellant complains that the court erred in giving certain instructions and in overruling defendant's motion for a directed verdict. An examination of the record discloses no prejudicial error in this respect.

Appellant further contends that the evidence is not sufficient to sustain a judgment in a case of this character. The record discloses that there was evidence submitted on every essential element from which a jury could infer an agreement to pay for the services rendered. There being sufficient evidence to support the finding of the jury, the verdict will not be disturbed.

The judgment of the trial court is hereby

AFFIRMED.

IN RE ESTATE OF ANDERS G. NILSON.
E. I. ELLIS, ADMINISTRATOR, APPELLEE, V. ALMITTA NILSON, APPELLANT: CHARLES M. SCHROEDER, INTERVENER, APPELLEE.

FILED MARCH 30, 1934. No. 28676.

1. **Courts.** A litigant who has invoked the jurisdiction of the court upon a matter of which it has power to take cognizance cannot thereafter object thereto.
2. **Pleading.** "If a defendant desires an affirmative judgment against the plaintiff, he should state in his answer the ultimate facts to support his contention. If he fails to allege an essential fact, but it is pleaded by his adversary, an affirmative judgment in defendant's favor may be sustained by the pleadings." *Snyder v. Collier*, 85 Neb. 552.

APPEAL from the district court for Burt county: CHARLES LESLIE, JUDGE. *Affirmed.*

William A. Ehlers, for appellant.

W. M. Hopewell and *Orville Chatt, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

CHAPPELL, District Judge.

A petition was filed in the county court of Burt county, Nebraska, on February 13, 1931, by E. I. Ellis, administrator, with the will annexed, of the estate of Anders G. Nilson, deceased, praying for approval of his accounts as administrator, for order of distribution of the funds then in his hands, for directions by the court as to certain money then in his possession, for final settlement of the estate, and for final discharge as administrator therein. He alleged in substance that the estate was insolvent, and that he had on hand $983.86 in cash and, in addition thereto, $3,200 concerning which he asked specific directions of the court as to its disposition. In this connection he alleged in substance that on or about March 21, 1930, he was called to the farm home of the deceased and his widow, Almitta Nilson, and that at that time Almitta Nilson gave into his possession cashier's checks upon the First National Bank of Tekamah, Nebraska, payable to deceased in the amount of $3,500; that at that time Almitta Nilson stated that $2,000 of this amount was to be hers, but that nothing was said concerning the remaining $1,500; that the petitioner brought the cashier's checks to town and, as agent of Anders G. Nilson, deceased, indorsed them, and has since that date retained this sum of money, except $300 thereof, in the accounts of the Tekamah Investment Company.

The court, upon the filing of this petition, fixed a time for hearing and notice of final settlement, and hearing thereon was duly given as provided by law. To this petition Almitta Nilson filed answer on February 13, 1931,

objecting to that part of the petition with reference to the $3,200, denying generally each and every allegation with reference thereto, alleging that this money was her own individual personal property and not in the possession of the administrator as such, but that at all times since March 21, 1930, it had been deposited and invested with the Tekamah Investment Company, a corporation, to her credit and was no part of the estate. She then prayed that the court, upon hearing, find and direct that the $3,200 was not a part of the estate and that the administrator was not entitled to it.

The matter came on for hearing in the county court by agreement of all the parties, they being present in open court with their respective attorneys, together with Charles M. Schroeder, a creditor of the estate, and his attorney. Thereupon the county court entered a decree approving the final report of the administrator, ordering the distribution of funds in his hands, holding that the special fund of $3,200, as listed in the final report of the administrator, was and is the property of the estate, and specifically directed that it should be so considered in the distribution thereof; that, after the payment of certain claims, the balance then remaining in the administrator's hands should be distributed *pro rata* among the creditors, Charles M. Schroeder being one of them, and that the administrator was entitled to be discharged.

Almitta Nilson perfected an appeal to the district court for Burt county, Nebraska, whereupon the case was tried upon the transcript and pleadings from the county court. After full hearing, the parties all being present in court with their attorneys, decree was entered by the district court sustaining generally the findings of the county court. Almitta Nilson then filed a motion for new trial, which was sustained by the court, and as a part of the order sustaining such motion, the court ordered that the parties file pleadings setting forth their issues. She, thereupon, filed a petition in the district court for Burt county, Nebraska, in which she set forth verbatim all of the allega-

tions of the administrator's petition which he filed in the county court with reference to the $3,200 fund in controversy, her answer to that petition, and the findings of the county court with reference thereto. She then alleged that no other pleadings were filed with respect to this fund in the county court; that the entire $3,200 was her own personal, individual property and not the property of the deceased or the estate, and prayed that the fund described in the administrator's petition for final settlement and account be decreed to be her personal property and no part of the estate. To this petition the administrator filed answer without traversing the allegations of her petition, but renewing his prayer as made in the county court. To the answer she filed reply denying generally the allegations thereof and reasserting her claim to the fund.

The creditor, Charles M. Schroeder, also filed an answer to her petition denying generally the allegations of her petition and praying that the fund in controversy be found by the court to be a part of the estate. After a motion was overruled to strike the answer of the creditor, she filed reply thereto denying generally the allegations of the answer.

A trial was had in the district court for Burt county, Nebraska, upon these issues and a decree was entered finding generally that there was not sufficient evidence before the court to sustain her claim to this fund, directing the administrator to distribute the remaining assets according to the further order of the county court after a certified copy of this decree should be filed therein.

Appeal is taken by her to this court. She contends that, the administrator not having filed reply to her answer in the county court and not having denied the allegations of her petition in the district court, no issue was ever presented in either court by the pleadings upon which a judgment could be based; in other words, not being denied by the administrator, it was a legally ad-

mitted fact in both courts that she was the owner of the fund. This contention cannot be sustained. There is no provision of the statute requiring that such pleadings be filed in the county court by the administrator. He was an officer of the court under its supervision, direction and control, in an *in rem* proceeding. *Lewis v. Barkley,* 91 Neb. 127; *Fitch v. Martin,* 83 Neb. 124, on rehearing, 84 Neb. 745; *Stichter v. Cox,* 52 Neb. 532; *Estate of Fitzgerald v. First Nat. Bank of Chariton,* 64 Neb. 260; *In re Estate of Creighton,* 91 Neb. 654; *In re Estate of Sweeney,* 94 Neb. 834. Further, no objection was made either orally or in writing that no reply had been filed; the trial proceeded as if the answer was denied generally, and it was waived. *Loan & Trust Savings Bank v. Stoddard,* 2 Neb. (Unof.) 486; *Schuster v. Carson,* 28 Neb. 612; *Missouri P. R. Co. v. Palmer,* 55 Neb. 559; *Minzer v. Willman Mercantile Co.,* 59 Neb. 410; *Gruenther v. Bank of Monroe,* 90 Neb. 280; *Gross v. Scheel,* 67 Neb. 223; *Hunter v. Weiner,* 103 Neb. 538; *In re Estate of Cheney,* 78 Neb. 274; *Krbel v. Krbel,* 84 Neb. 160; *American Freehold Land Mortgage Co. v. Smith,* 84 Neb. 237; *Crilly v. Ruyle,* 87 Neb. 367. The case of *Snyder v. Collier,* 85 Neb. 552, disposes of appellant's contention with reference to the issues in the district court. In this case the court said: "If a defendant desires an affirmative judgment against the plaintiff, he should state in his answer the ultimate facts to support his contention. If he fails to allege an essential fact, but it is pleaded by his adversary, an affirmative judgment in defendant's favor may be sustained by the pleadings." See Maxwell, Pleading and Practice (4th ed.) 152, 689. Appellant made all of the administrator's petition in the county court with reference to the $3,200 fund and her answer thereto filed in the county court, together with the findings of the county court, a part of her petition in the district court, and the administrator in his answer prayed for affirmative relief as prayed in his petition in the county court. After appellant filed reply thereto, the trial

proceeded without this objection as if the issues had been properly made up. This court will take into consideration all of the facts pleaded in the various pleadings and render judgment accordingly. *Snyder v. Collier, supra.*

Appellant contends that the county court was without jurisdiction of the subject-matter, therefore the district court was without jurisdiction upon appeal, for the reason that the county court had no jurisdiction to hear a claim asserted against the estate by a person claiming title paramount to the property against the estate, the property being in the hands of a third party who is not a party to this suit. The administrator alleged in his petition in the county court that he had possession of the property, and the evidence discloses that the fund in question was actually in his possession and under his control, and not in the possession of a third party except for safekeeping and to identify the fund. Appellant concedes this, but claims that he had it for her. The evidence does not sustain this contention. We proceed upon the theory that the money was in the hands of the administrator, an officer of the court, under its direction, supervision and control, and, therefore, in the hands of the court. The petition which he filed in the county court conferred upon that court jurisdiction of the subject-matter. The administrator had the right to and was required to make a final report, have his account settled and approved, obtain order of distribution, and be discharged by the court. He had the right, and it was his duty, to ask for directions from the county court as to the disbursement of money in his hands, and the county court had the power to give and enforce the same. Const. art. V, sec. 16; Comp. St. 1929, secs. 27-503, 27-504, 30-405, 30-406, 30-601, 30-617, 30-1409, 30-1412, 30-1414, 30-1505; Comp. St. Supp. 1931, sec. 30-1412; 15 C. J. 801; 24 C. J. 465. The county court has original and exclusive jurisdiction in the settlement of estates by which distribution is made of the assets, and its final orders are binding upon all persons. The proceeding is *in rem.* All persons

interested in the assets are considered parties in the county court, whether named or not, and they may appear for the purpose of protecting their interests in the county court or on appeal to the district court. Appeal to the district court removes the whole case to the district court, and all persons interested in the distribution are necessary parties in the district court and entitled to be heard there. *In re Estate of Creighton, supra; In re Estate of Sweeney, supra; In re Estate of Bayer,* 116 Neb. 670; *Blair v. Estate of Willman,* 105 Neb. 735. See, also, *Lewis v. Barkley, supra; St. James Orphan Asylum v. Shelby,* 75 Neb. 591; *Genau v. Abbott,* 68 Neb. 117; *Reischick v. Rieger,* 68 Neb. 348; *Boales v. Ferguson,* 55 Neb. 565; *Youngson v. Bond,* 69 Neb. 356; *Wilson v. Coburn,* 35 Neb. 530; *Williams v. Miles,* 63 Neb. 859; *Andersen v. Andersen,* 69 Neb. 565; Dame, Probate and Administration (3d ed.) 13, 14. These cases also dispose of the appellant's contention that the creditor, not having filed any pleadings in the county court, should not have been permitted to file an answer in the district court or appear as a party therein.

The test of jurisdiction is whether the tribunal had the power to enter upon the inquiry, and not whether its methods were regular, its findings right, or its conclusions in accord with the law. The petition presents a cause of action within the jurisdiction of the county court. The appellant, by filing an answer in which she claims the property as her own, neither gives nor takes away the jurisdiction of the court to hear and determine the cause. Jurisdiction is not gained or lost in this proceeding by the status of the appellant or by her acts. It is ascertained from the petition of the administrator which asserts his rights and status. Appellant's answer, for all intents and purposes, amounted to no more than an objection to the final account and distribution of money in the hands of the administrator, and evidently was so considered by the court. The appellant, if she had a remedy,

should have proceeded in the proper forum to enforce it. *Miller v. Roby*, 9 Neb. 471; *Spielman v. Flynn*, 19 Neb. 342; *Neihardt v. Kilmer*, 12 Neb. 35; *Strong v. Combs*, 68 Neb. 315; *Radil v. Sawyer*, 85 Neb. 235; *Johnson v. Miller*, 50 Ill. App. 60; *Peninsular Savings Bank v. Ward*, 118 Mich. 87, 93; *Clevenger v. Figley*, 68 Kan. 699; *Wanzer v. Howland*, 10 Wis. 7; *Eagle Cliff Fishing Co. v. McGowan*, 70 Or. 1; *Fred Miller Brewing Co. v. Capital Ins. Co.*, 111 Ia. 590; 15 C. J. 733; *Robinson v. Levy*, 217 Mo. 498; *Mayor and Aldermen of Jersey City v. Gardner*, 33 N. J. Eq. 622; *Boone v. Poindexter*, 20 Miss. 640; 12 Ency. of Pleading and Practice, 129, sec. 8; *Roth v. Union Nat. Bank*, 58 Okla. 604; *Crozier v. Stephens*, 2 Tex. Civ. App. 704; *Scarborough v. Powell*, 2 Tex. Civ. App. 644.

In any event, the appellant has had her day in court. When a new trial was granted in the district court, the trial judge properly ordered that pleadings be filed to present the issues contended for by the parties. Thereupon appellant filed her own petition, not an answer, in which she asked for affirmative relief. The issues were thereupon made up in every manner, in so far as this fund is concerned, as if she had filed an original action therein. Evidence was adduced fully upon every matter claimed by her. The evidence discloses conclusively that this fund was the property of the deceased. The administrator acted for him and not this appellant in taking the checks and in indorsing and cashing them. It is uncontradicted that the deceased obtained the checks from the bank by purchase with proceeds obtained by him from the sale of his own cattle, and that he did this in the first instance to avoid the process of creditors. She does not and cannot claim that it was a trust fund for her. The evidence is to the contrary. She must do that to maintain this action. *Coleman v. McGrew*, 71 Neb. 801. Under the evidence, if there were a trust fund for any one, it was for the deceased, and, in view of section 36-201, Comp. St. 1929, it was therefore a trust fund for the benefit of

creditors. She cannot maintain an action against the administrator for the recovery of money only. Comp. St. 1929, sec. 30-801. At most, appellant had a claim against the estate for money owing her by the deceased. She took the position that it was her money, the fund itself, and, failing in the proof, she cannot now, after defeat in the district court, claim lack of jurisdiction over the subject-matter if the court did actually have jurisdiction thereof by her own acts. *Wayne v. Alspach,* 20 Idaho, 144; *Warren v. Glynn,* 37 N. H. 340; *North Hudson County R. Co. v. Flanagan,* 57 N. J. Law, 236; *Tygh v. Dolan,* 95 Ala. 269; *Norton v. Miller,* 25 Ark. 108; *Dufossat v. Berens,* 18 La. Ann. 339; *Hunt v. Taft,* 100 Mass. 91; *Paul v. Fulton,* 25 Mo. 156; *Bodie v. Bates,* 99 Neb. 253; 10 R. C. L. 699, sec. 27; 7 R. C. L. 1043, sec. 76; *Robertson v. Smith,* 129 Ind. 422, 15 L. R. A. 273, and note.

Appellant contends that the court erred in refusing to permit her to testify as to the manner of the source of the funds claimed by her as her own, after the administrator and another witness had already testified in part concerning the source thereof. There was no controversy as to the source of the fund, and she was permitted to testify in full with reference thereto. The court properly refused to permit appellant to testify as to the conversations and transactions with the deceased concerning the fund after it came into existence. We determine this question upon the premise that the administrator had the fund in his possession. Appellant will not be permitted to claim that it was in the hands of a third party and evade section 20-1202, Comp. St. 1929, which provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such

transaction or conversation or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation."

The evidence of the deceased was not taken and read by the adverse party in regard to such transactions or conversations; neither did the administrator testify concerning them, and he did not introduce a witness who testified concerning such transactions or conversations. The appellant had a direct legal interest in the result of this proceeding as she claimed all of the fund as her own, and the administrator was the representative of the deceased person. *Kroh v. Heins,* 48 Neb. 691; *Fitch v. Martin, supra; Wamsley v. Crook & Hall,* 3 Neb. 344; *Ransom v. Schmela,* 13 Neb. 73; *Magemau & Co. v. Bell,* 13 Neb. 247; *Housel v. Cremer,* 13 Neb. 298; *Rakes v. Brown,* 34 Neb. 304; *Smith v. Perry,* 52 Neb. 738; *McEntarffer v. Payne,* 107 Neb. 169; *McCoy v. Conrad,* 64 Neb. 150; *Sorensen v. Sorensen,* 56 Neb. 729; *Dickenson v. Columbus State Bank,* 71 Neb. 260; *In re Estate of Neckel,* 80 Neb. 123; *Tecumseh Nat. Bank v. McGee,* 61 Neb. 709; *Geise v. Yarter,* 112 Neb. 44; *Wylie v. Charlton,* 43 Neb. 840; *Brown v. Forbes,* 1 Neb. (Unof.) 888; *Broeker v. Day,* 124 Neb. 316; *Wright v. Wilds,* 124 Neb. 11.

The appellant discusses other assignments of error in her brief, but we deem it unnecessary to discuss them in this opinion.

We conclude that the judgment of the district court is right, and it is

AFFIRMED.

CHRIS J. KIENKE, APPELLEE, V. WILLIAM N. HUDSON, APPELLANT.

FILED MARCH 30, 1934. No. 28870.

1. **Limitation of Actions.** Payment of principal or interest, after the maturity of a promissory note, made before the statute of limitations has run, tolls the statute, and a new right of action accrues after each payment.
2. ———. Under the provisions of section 20-216, Comp. St. 1929, any payment upon a promissory note, made through the arrangement of the maker, or such payment as is the natural and reasonable sequence of his agreement, will stay the running of the statute of limitations.
3. ———. Partial payment of principal or interest upon a promissory note by one joint maker, with the knowledge and consent of the other, out of funds in which they are jointly interested, tolls the statute of limitations as to each maker.

APPEAL from the district court for Keya Paha county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Sterling F. Mutz and *Robert S. Stauffer,* for appellant.

J. J. Harrington and *Ross Amspoker, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and REDICK, District Judges.

CHAPPELL, District Judge.

This case is presented to the court a second time, having been heretofore reported in 122 Neb. 475. After reversal, as a companion case to *Kienke v. Kirsch,* 121 Neb. 688, and retrial thereof to the court, without a jury, the sole question for our determination is whether this action was barred by the statute of limitations.

Plaintiff, appellee herein, filed an action in the district court for Keya Paha county, Nebraska, on October 10, 1929, against George J. Kirsch and William N. Hudson, defendants, to recover $7,746, with interest at 8 per cent. from October 2, 1929, the balance due upon a promissory note dated December 2, 1920, due six months after date, indorsed on the back of which were payments of interest

or principal, or both, on the dates December 1, 1921, February 6, 1923, September 26, 1924, January 9, 1925, June 10, 1925, June 2, 1926, December 4, 1926, June 11, 1927, December 2, 1927, and June 2, 1928. Defendant George J. Kirsch defaulted and judgment was rendered against him. Defendant William N. Hudson answered and, among other defenses, pleaded the statute of limitations. Upon trial thereof the court found generally for plaintiff and against defendant William N. Hudson and entered judgment for $9,808, with interest at 8 per cent. from February 10, 1933, from which he appeals to this court.

It is admitted that defendant George J. Kirsch made all the payments. The contention is, however, that appellant specifically authorized the payments to be made for him, and that, in any event, the payments were made under such circumstances that appellant is estopped to claim that they were not made for him with his knowledge and authority.

The evidence discloses that, at the time this note was given, plaintiff was the owner of a secured note for more than $8,000 given to him for valuable consideration by one Ira Baker. The Burton State Bank, of which defendant George J. Kirsch was cashier, and appellant, his father-in-law, was vice-president, held Ira Baker's unsecured note. In order that the bank could own both of these notes, have both of them under its control and obtain the benefit of plaintiff's secured note, thus strengthening the bank's paper, and to pay a small balance owing plaintiff, the defendants gave the note in controversy to plaintiff and took over the secured note then owned by plaintiff. At the time the note in controversy was given it was agreed between the parties that defendant George J. Kirsch should pay the principal and interest as it accrued through the Burton State Bank. Appellant denies this, but a careful reading of the evidence convinces us and warranted a finding by the trial court that these payments were made by defendant George J. Kirsch as previously agreed upon.

The appellant and defendant George J. Kirsch were

both makers of this note and primarily liable. *Kienke v. Kirsch,* 121 Neb. 688; *Kienke v. Hudson,* 122 Neb. 475. We said in *Stroud v. Payne,* 124 Neb. 612: "Any voluntary payment made upon a promissory note by the maker, or by any one by him authorized, will be sufficient to arrest the running of the statute of limitations. * * * Whether a payment made on a promissory note by a third party was authorized by the maker is a question of fact, and the findings of a jury upon such question will not be disturbed unless clearly wrong." Having been tried to the court without a jury, the same result follows. See, also, *McNamee v. Graese,* 245 N. W. (S. Dak.) 924; *Bosler v. McShane,* 78 Neb. 86.

Further, the evidence discloses that on May 6, 1918, plaintiff sold to defendant George J. Kirsch certain shares of stock then owned by him in the Burton State Bank; that thereafter, on May 7, 1918, appellant was issued 20 shares of this stock and was thereupon elected vice-president and director of the bank, and thereafter continued at all times to be a stockholder, director, vice-president and active executive officer of the bank until its insolvency in 1928. During all this period he attended meetings of the stockholders, officers, executives and directors of the bank; signed his name to the minutes, records and reports as such; made a thorough examination of the books and records of the bank and approved them as correct; authorized and declared dividends; and authorized transfers of undivided profits to the surplus account; authorized the borrowing of money and the payment of salaries to duly elected officers and employees of the bank; knew that the payments upon this note were made and the manner thereof through the bank by George J. Kirsch from dividends declared out of its undivided profits account and charged as expense. He will not now be permitted by this court to say that such payments were not made by him or by some one duly authorized by him so to do. *Merchants Bank v. Rudolf,* 5 Neb. 527; *Kienke v. Kirsch, supra; Kienke v. Hudson, supra; McNamee v. Graese,*

supra. The payments on the note were the natural and reasonable sequence of his agreement. *Bosler v. McShane, supra; Ebersole v. Omaha Nat. Bank,* 71 Neb. 778.

Appellant's contention that he could use declared dividends for any purpose he desired, that he gave them to defendant George J. Kirsch to do with as he pleased, that the payments upon the note were made by the defendant George J. Kirsch out of declared dividends, and that he owed no duty to plaintiff in this connection, cannot assist him in the controversy. The evidence is clear that the payment made on January 9, 1925, was made out of the undivided profits of the bank and charged upon the books of the bank as expenses. It was not paid out of declared dividends. The statute of limitations did not begin to run until after the payment on January 9, 1925, and the action was not barred in any event until after January 9, 1930. Payment, after the maturity of a note, made before the statute of limitations has run, tolls the statute, and a new right of action accrues after each payment. Comp. St. 1929, sec. 20-216; *Blair v. Estate of Willman,* 105 Neb. 735; *McLaughlin v. Senne,* 78 Neb. 631; *Ebersole v. Omaha Nat. Bank, supra; Teegarden v. Burton,* 62 Neb. 639; *Rolfe v. Pilloud,* 16 Neb. 21; *Sornberger v. Lee,* 14 Neb. 193.

The judgment of the district court was right, and it is

AFFIRMED.

JOHN SHEEHY, APPELLEE, V. CHRISTINA ABBOUD, APPELLANT.

FILED MARCH 30, 1934. No. 28772.

1. **Automobiles: LIABILITY TO GUEST: GROSS NEGLIGENCE.** In determining whether the evidence is sufficient for submission to the jury on the issue of gross negligence of a motorist in an action against him by a guest for personal injuries, the trial court should consider all evidential facts and circumstances surrounding the particular case, including evidence

of speed which might amount to gross negligence in one case and fall far short thereof amid different surroundings and dissimilar circumstances in another.

2. ———: ———: ———. In the motorists' guest law, "gross negligence" indicates a degree of negligence greater than want of ordinary care or slight negligence; negligence of a very high degree and absence of even slight care in the performance of duty, but does not necessarily extend to wanton or wilful or intentional disregard for a guest's safety.
3. **Negligence.** The degree of negligence comprehended by the comparative negligence statute is not ordinarily applicable in actions involving the motorists' guest statute.
4. **Evidence** examined and *held* sufficient to warrant the trial court in submitting the question of gross negligence to the jury.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Dressler & Neely, for appellant.

Rosewater, Mecham, Burton, Hasselquist & Chew and *Rudolph Tesar, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

CHASE, District Judge.

This is an action brought by plaintiff to recover damages for injuries claimed to have resulted from an automobile accident. The trial resulted in a verdict for plaintiff, and from the action of the trial court rendering judgment thereon the defendant prosecutes an appeal to this court.

One of the questions urged for reversal is that the evidence is insufficient to support the verdict. To dispose of the contention we must determine whether there is sufficient evidence of gross negligence to justify the submission thereof to the jury.

It appears that the plaintiff was a guest riding in the automobile owned by defendant, but which, at the time, was operated by her brother. The driver of the car was a youth 16 years of age. The evidence discloses almost

without dispute that the plaintiff was a guest riding with defendant's brother at the time of the accident; that the plaintiff for some time had been a friend of the driver's family and he lived near the home of the Abbouds. The accident occurred about 5:30 p. m. on July 13, 1932. The parties lived in the south part of the city of Omaha. Plaintiff got into the car for the purpose of riding home with the defendant's brother. They started home from the city about 5:30 p. m., and on their way proceeded south across the Sixteenth street viaduct, which is approximately three blocks in length. There was considerable traffic congestion that evening on the viaduct. In crossing the viaduct the driver passed a number of automobiles, and the plaintiff claims to have objected to his manner of operation and the rate of speed of the car. The witnesses for plaintiff testified that this car crossed the viaduct at a rate of speed from 45 to 55 miles an hour up to the time the accident occurred, while the defendant's witnesses say that it was about 35 miles an hour. It appears further that at the time the automobile arrived at a point near the south end of the viaduct, and a little more than 100 feet north of where Pierce street intersects Sixteenth street, the defendant's brother was driving at a high rate of speed only a short distance behind another automobile; that just a few feet before the head automobile arrived at the street intersection the driver of that automobile signaled by putting out his left hand, indicating that he was going to turn to the left down Pierce street. By this time the driver of the car in which plaintiff was riding was so close to the car in front that when the turn signal came he was unable to stop. Confronted by this situation he turned sharply to the left and passed in front of the car ahead, which was then heading toward the east. The driver states that after he had passed the turning car he headed directly toward a telephone pole on the south side of Pierce street; that he gave his car a sharp turn to the right to avoid hitting the pole, lost control thereof, which caused it to "wobble," as the witnesses state, and it

jammed into the curb at the corner of the street, striking the iron grating at the intake of the storm sewer, overturning the car and injuring plaintiff. About the only dispute as to the material facts is the rate of speed the car was traveling at the time of the accident.

If the plaintiff is entitled to recover at all, it must be on evidence required by section 39-1129, Comp. St. Supp. 1931, which provides, so far as material to our consideration, that "the operator of a motor vehicle shall not be liable for any damage to any * * * person riding in said motor vehicle as a guest * * * and not for hire, unless such damage is caused by * * * the gross negligence of the * * * operator." It therefore becomes necessary to determine what is meant by the term "gross negligence" as it appears in this statute. In construing the guest law this court recently held:

"We are of the opinion that in adopting the guest act the legislature used the term 'gross negligence' as indicating a degree of negligence. Negligence may be slight, ordinary, or gross. Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It may be said that it indicates the absence of even slight care in the performance of a duty, and such, we think, is the meaning intended by the legislature.

"What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence." *Morris v. Erskine,* 124 Neb. 754.

This interpretation was adopted in later cases. *Gilbert v. Bryant,* 125 Neb. 731; *Swengil v. Martin,* 125 Neb. 745. In the present case it appears quite conclusively that the operator of the car at and near the point of accident was driving approximately 50 miles an hour; that Sixteenth street is one of the busy streets of Omaha, and was at the time considerably clogged with traffic. On the issue as to gross negligence each case must stand upon its own particular facts and circumstances. A rate of speed which

would amount to gross negligence in one case might, amid different surroundings and dissimilar circumstances, fall far short thereof. This question is ordinarily a question of fact to be determined by the jury, if from the whole record there appears to be sufficient evidence to justify the submission of the question to them. The boy who was driving the automobile was but little past the statutory age entitling him to a driver's license. Impetuous, as youth too often is, he was operating the car in that congested section of the city at a rate of speed in violation of all reasonable rules of prudence and safety applicable to the surroundings. Gross negligence disregards the reasonable rules of caution properly applicable to the surroundings present, but does not necessarily extend to the degree that a person under such circumstances must be guilty of wilful or intentional wrong-doing. To place that construction upon the term would have the effect of practically nullifying the legislative intent in the passage of the act.

After a careful examination of the record and giving due consideration to the surroundings and all the circumstances present, we conclude that the evidence is sufficient to support the verdict. Consequently, the court did not commit error in submitting that question to the jury. However, in so holding we are not unmindful of the rule that, where one is confronted by an emergency, he is not negligent in not taking the course deliberate judgment might show to be the safer. This is not applicable to the present situation. The extension of that rule is also to the effect that one cannot claim the benefit of the doctrine where the emergency was brought about by the negligent act of the party seeking to invoke it. This rule is applicable only when a person is confronted by such an emergency, he having been placed in such a position by the exercise of ordinary care.

It becomes unnecessary to discuss the other assignments of error with the exception of the one predicated upon the trial court's action in giving, upon its own motion, instruc-

tion No. 10. This instruction is an attempt to apply the comparative negligence statute to the recent so-called "guest statute." In that instruction the court told the jury that, if the negligence of the automobile driver falls in any degree short of gross negligence under the circumstances, the contributory negligence of the plaintiff, however slight, would defeat a recovery. We cannot indorse this as being a correct expression of the law in actions based upon the guest statute. If the negligence of the driver falls in any degree short of gross negligence, under the guest statute, there could be no recovery, and the question of attending or incidental contributory negligence becomes wholly immaterial. It follows as a matter of course that, where there is no legal right of recovery, there will be none to be defeated by contributory negligence. Further on in the instruction the court tells the jury that if the negligence of the plaintiff is found to be slight only, and the negligence of the driver gross, the plaintiff may recover. This also is not a correct statement of the law. In actions arising under the guest statute the negligence of the plaintiff may be more than slight, or, in other words, if it amounts to anything less than gross, the plaintiff could still recover. This is not a new doctrine except as to the degree of negligence. The courts have long recognized that, where the negligence of the plaintiff is equal in degree to the negligence of the defendant, recovery is not allowable. One of the principal objects of the comparative negligence statute is to permit deductions from recovery, where the evidence shows the plaintiff's own carelessness in some manner enhanced the damage, and thus permit the jury to make a proper deduction from the whole damage sustained—that amount to which, in their judgment, the negligence of the plaintiff made contribution. We do not believe that the comparative negligence statute becomes applicable generally in cases where the right of recovery is limited to a single degree of negligence. The statute comprehends that negligence ranging in any degree from slight up to and in-

cluding gross is actionable, providing the plaintiff is not shown to be guilty of such contributory negligence as would defeat his right of recovery, while the guest statute does not comprehend that range of actionable negligence, but is limited to negligence of a single character. Hence, as we view it, the only part of the comparative negligence statute that could be properly applicable to actions of this character is that part which permits the jury to deduct any amount which the plaintiff's contributory negligence bears to the whole amount of damage sustained. This instruction, while not containing proper statements of the law, could only, as we view it, become prejudicial in the event the plaintiff was unsuccessful in the action. The jury having found for the plaintiff, no prejudice could result therefrom, and hence no reversible error was committed by the trial court in giving the instruction.

For reasons herein stated, the judgment is

AFFIRMED.

AGNES BELIK, APPELLEE, V. MIKE WARSOCKI, APPELLANT.

FILED MARCH 30, 1934. No. 28789.

1. **Automobiles: LIABILITY TO GUEST: GROSS NEGLIGENCE: BURDEN OF PROOF.** In an action by a guest against a motorist for personal injuries caused by the latter's negligence, it is necessary, under the guest law, for plaintiff to allege and prove that defendant was guilty of gross negligence.
2. ———: ———: ———: PROOF. In determining whether the evidence is sufficient for submission to the jury on the issue of gross negligence of a motorist in an action against him by a guest for personal injuries, the trial court should consider all evidential facts and circumstances surrounding the particular case, including evidence of speed which might amount to gross negligence in one case and fall far short thereof amid different surroundings and dissimilar circumstances in another.
3. ———: ———: ———. In the motorists' guest law, "gross negligence" indicates a degree of negligence greater than

want of ordinary care or slight negligence; negligence of a very high degree and absence of even slight care in the performance of duty, but does not necessarily extend to wanton or wilful or intentional disregard for a guest's safety.

4. ———: OPERATION. Where one driving an automobile is suddenly confronted by an emergency, requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong.

5. ———: ———. A party driving an automobile lawfully, upon his proper side of the highway, who observes an approaching car, has a right to assume that the driver of the oncoming car will not violate the law in passing.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Reed, Ramacciotti & Robinson, for appellant.

Gray & Brumbaugh and *Leo Fried, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

CHASE, District Judge.

This action is to recover damages for personal injuries alleged to have been occasioned by an automobile accident. The case was tried to a jury resulting in a verdict for the plaintiff, and from the action of the trial court overruling a motion for new trial and rendering judgment on the verdict the case is presented to this court for review.

Numerous grounds are assigned for reversal, one of which is that the court erred in overruling defendant's motion to direct a verdict. Another is that the verdict of the jury is contrary to the evidence. We shall confine our discussion to these two propositions.

The plaintiff alleges for her cause of action that she was riding in an automobile as the guest of the defendant, and that due to the gross negligence of the defendant in the operation of the automobile he caused the same to overturn, from which she suffered injuries.

The facts may be summarized as follows: Late in the

afternoon of November 13, 1931, the plaintiff, her mother and stepfather, her sister, being the wife of the defendant, and the defendant, her brother-in-law, together with two small children, were all returning to their home in the city of Omaha from the funeral of a half-sister, which they had attended. They were traveling over highway No. 16, which is paved by a concrete slab approximately 18 feet in width. When they reached a point a few miles east of where the road crosses the Elkhorn river bridge in Douglas county, traveling in an easterly direction, the defendant driving, at a rate of speed from 40 to 45 miles an hour, the car approached near three girls walking east, side by side, along the north edge of the pavement, occupying about four or five feet thereof. As the defendant's car approached near these pedestrians a car came from the east, both cars reaching the girls about the same time. The car coming from the east, in an apparent endeavor to pass the girls, suddenly turned to the south, five or six feet across the black line in the middle of the pavement. The defendant, startled by the sudden appearance of the approaching car in his lane of travel, in order to avoid colliding with the same, suddenly turned his car to the right until the two right wheels were off the pavement. After passing the girls he turned the car to the left trying to get back upon the pavement, which is four or five inches higher at that point than the earth shoulder along the south edge. In making the turn the right front wheel caught the edge of the pavement, causing his car to swing, and as it climbed up on the pavement it veered about somewhat, lost its equilibrium and turned over on its side, sliding into the ditch on the south side of the pavement, where it finally stopped.

What we are called upon to determine, under the facts presented by the record, is whether or not there was sufficient evidence of gross negligence, which was the proximate cause of the plaintiff's injuries, as would warrant the court in submitting the question to the jury.

The plaintiff contends that the driver was guilty of

gross negligence, in that he was operating the automobile at a high rate of speed with his right hand, while his left arm was upon the window. This claim is hardly borne out by the evidence, as his wife, who was sitting in the front seat with the defendant, testifies that he was sometimes accustomed to drive in that manner, but at that time she would not say whether he had been or not. The defendant testified that he was using both hands in the operation of the automobile. The guest law applicable to this case provides:

"The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of said motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle." Comp. St. Supp. 1931, sec. 39-1129.

There being no claim of any intoxication on the part of the driver, therefore, we must confine our investigation solely to the question of gross negligence.

It appears without dispute that the highway at this particular point passes through open country, with nothing to obstruct one's vision for at least one mile to the eastward. On the homeward journey the defendant had been driving this car for approximately 40 miles just before the accident occurred. He had a few seconds previously rounded a curve possibly 300 feet back of the scene of the accident. He had been, at the rate of speed he was driving, able to go around this curve without accident.

This court has held that the question of gross negligence must be determined from the facts and circumstances of the particular case under consideration. *Morris v. Erskine,* 124 Neb. 754. An automobile driven at a certain rate of speed might amount to gross negligence under certain circumstances, when it would fall far short thereof under other or different circumstances. In construing the guest law this court recently held:

"We are of the opinion that in adopting the guest act the legislature used the term 'gross negligence' as indicating a degree of negligence. Negligence may be slight, ordinary, or gross. Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It may be said that it indicates the absence of even slight care in the performance of a duty, and such, we think, is the meaning intended by the legislature.

"What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence." *Morris v. Erskine*, 124 Neb. 754.

It can hardly be gainsaid that just before the accident happened the defendant was confronted with an emergency, in that the automobile traveling westward suddenly turned into his lane of travel, which required the defendant to make a decision almost within the twinkling of an eye, as to the best course to pursue in order to avoid an accident. The law is quite well settled that, where one is confronted suddenly with an emergency and is required to act quickly, he is not necessarily negligent if he pursues a course which mature reflection or deliberate judgment might prove to be wrong. The law does not require under such circumstances that no mistake should be made. All it requires is that one demean himself as an ordinary, careful and prudent person would have done, under like circumstances, and if he does that, he is not held to be negligent, even though he committed an error in judgment. *Wilson v. Roach*, 101 Okla. 30. Neither is a person, under such circumstances, required to exercise the same degree of care and circumspection a prudent person would have exercised where no danger is present. *Frish v. Swift & Co.*, 97 Neb. 707. It has also been held that where two alternatives are presented to a traveler on a highway as modes of escape from collision with an approaching traveler, either of which might fairly be chosen by an intelligent and prudent person, the law will not hold him

guilty of negligence for taking either. *Skene v. Graham*, 114 Me. 229.

This defendant, having observed the approaching automobile on its proper side of the highway, coming toward him, would have a right to assume that it would continue to remain on its proper side of the road and not violate the law in turning into his lane of travel. *Bainter v. Appel*, 124 Neb. 40. Therefore, when it turned across the middle line of the pavement into the defendant's lane of travel, he was then suddenly confronted with a highly dangerous situation of such a character as the law did not require him to anticipate.

In cases where it is claimed the evidence is not sufficient to support the verdict, great care should be exercised by the reviewing court in weighing and analyzing the evidence. Owing to the degree of negligence necessary, the guest statute presents cases somewhat new in character. Almost invariably the occupants of the car are either relatives or intimate friends, and consequently friendly to recovery. Especially is this true in cases where an insurance company will be the one ultimately liable. Oftentimes even the defendant seems willing to stultify himself by confessing to wrong-doing that the plaintiff might prevail. The record in this case appears quite the reverse. Both the defendant and his wife (who are sister and brother-in-law to the plaintiff) are to be commended for the apparently truthful manner in which they detail the story of the accident. They are the only ones who were able to see and detail accurately what occurred at the time.

Giving due consideration to all the material facts as they appear, we cannot adopt the view that the evidence of defendant's conduct was sufficient to require submission of the issue of gross negligence to the jury. Consequently it was error for the trial court to overrule the motion for a peremptory instruction. The judgment is reversed and the cause remanded.

REVERSED.

STATE, EX REL. HENRY J. BEAL, COUNTY ATTORNEY OF DOUGLAS COUNTY, RELATOR, V. OTTO J. BAUMAN, TREASURER OF DOUGLAS COUNTY, RESPONDENT.

FILED MARCH 31, 1934. No. 29150.

Statutes: AMENDMENT. Even though an act of the legislature professes to be an independent act, and does not formally purport to amend any prior act or acts, yet if, in fact, the legislative intent is to, and it clearly appears that the act does, make changes in an existing act or acts by adding new provisions or changing existing ones therein and mingling the new and the changed with the old on the same subject, so as to make of the old, the changed, and the new a connected piece of legislation covering the same subject, the later act must be considered an amendment of the former act or acts and within the constitutional prohibition.

Original application for writ of mandamus. *Writ allowed.*

Henry J. Beal, E. B. Crofoot and *Jack W. Marer*, for relator.

McDonald & Edens and *L. J. Te Poel*, for respondent.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LANDIS, District Judge.

EBERLY, J.

This is an action for mandamus brought in the original jurisdiction of this tribunal. It was instituted at the relation of Henry J. Beal, as county attorney of Douglas county, and its board of county commissioners, against the county treasurer of Douglas county, and was submitted on the alternative writ, the return of the respondent thereto, and stipulations of fact. The sole object of the action is to secure compliance with the following resolution, duly adopted by the county board on February 13, 1934:

"Whereas, the county treasurer of Douglas county has in his possession certain tax moneys other than moneys levied and collected for school purposes, and which moneys have been collected by said treasurer since August 10,

1933, from taxes levied for the year 1932 and prior years, same having been collected by him for levies made in the various respective years, and, whereas, included in said moneys are:

$18,306.91 levied for general county purposes
15.44 levied for county road purposes
730.68 levied for soldier relief
9.43 levied for special emergency bridge purposes
17.32 levied for payment of judgments
1,487.16 levied for mothers' pensions
170.88 levied for agricultural fair purposes
1,331.65 levied for county home

"Whereas, all of the obligations of Douglas county incurred for and during the year 1932 and all prior years have been paid in full and none of said moneys are required for the purposes for which the same were levied, that is to say, for obligations incurred for the respective years for which the same were levied, and,

"Now, therefore be it resolved: (1) That none of said moneys hereinbefore referred to are required for the purposes for which the same were levied. (2) That the county treasurer of Douglas county, Nebraska, is hereby authorized, instructed and directed to immediately transfer the 'moneys as above specified' to the 1934 county general fund."

The truth of the averments of the commissioners' resolution is not questioned. The sole defense is that compliance with the same on part of the county treasurer is rendered impossible by the provisions of chapter 135, Laws 1933 (Comp. St. Supp. 1933, sec. 77-1956), the same being an act entitled "An act relating to revenue; and to fix and determine the application of the proceeds derived from delinquent property taxes collected after the close of the fiscal year for which such tax may be levied." This defense is met by a challenge to the validity of that legislation as having been enacted in contravention of section 14, art. III of the Constitution, and therefore is void.

Section 14, art. III of our Constitution, so far as applicable to the present controversy, is as follows:

"No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

Respondent insists that House Roll No. 345 (Comp. St. Supp. 1933, sec. 77-1956) is an act independent and complete in itself, and does not contravene the restrictions of the Constitution.

Under the title quoted above this act provides: "All delinquent property taxes, whether real property or personal, collected by any county, city, village, school district or any other taxing district within the state of Nebraska, after the close of the fiscal year for which such tax may be or may have been levied, shall be applied and credited as follows, and shall be used for no other purpose: (a) Such delinquent taxes so collected by any county, city, village, school district or other taxing district, shall be applied first to the discharge of any unpaid obligation lawfully incurred for the fiscal year for which such tax was levied. (b) Such delinquent taxes when collected to an amount over and above such as may be required to discharge the obligations specified in subsection (a) hereof, shall be paid into a sinking fund to be used for no other purpose than to pay the interest and principal of the bonded indebtedness of such county, city, village or school district. (c) In case any county, city, village or school district, have no obligations of the character specified in subsection (a) herein, and no bonded indebtedness, then and in that event such delinquent taxes when collected shall be credited and paid into the general fund of such county, city, village, school district or other taxing district notwithstanding any more general law respecting the method and manner of applying the proceeds derived from delinquent property taxes in force in this state."

It will be noted that the "form" in which this legislation

is cast is that of an independent act. But Constitutions look to substance, not to form. The words of this act standing alone would be meaningless. It is only after it is applied to existing statutory provisions that it evidences any "command." It provides for no agencies, machinery, or means by which the object sought to be promoted may be secured. When applied to existing laws nothing new, independent, or complementary results. In other words, if the careful student should take House Roll 345 and with it annotate his Compiled Statutes, marking the changes it effects, when his labor was completed not a single new paragraph would be written therein, but old provisions irreconcilable therewith would be changed. In truth, the new enactment accomplished nothing of independent nature and its effect is wholly confined to "changes" of what theretofore existed, with the evident intent of its authors that by the mingling of the new changes with old provisions a connected piece of legislation covering the same and original subject would result. But this is strictly a process of amendment, and no portion of this act has any other mission. It therefore must be regarded as nothing but an amendatory act and strictly within the scope of the constitutional limitation controlling in the enactment of statutes for an exclusively amendatory purpose: "No law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed." Const. art. III, sec. 14.

The true question here is not at all new. Illinois has a similar constitutional provision, and, in a case involving identical controlling principles, announced the following rule: "Even though an act professes to be an independent one and does not purport to amend any prior act, yet if, in fact, it makes changes in an existing act by adding new provisions and mingling the new with the old on the same subject, so as to make of the old and the new a connected piece of legislation covering the same subject, the later act must be considered an amendment of the former and is within the constitutional prohibition." *Galpin v. City*

of Chicago, 269 Ill. 27. See, also, *Brooks v. Hatch*, 261 Ill. 179.

In *Sovereign v. State*, 7 Neb. 409, this court determined that an act in form wholly complete and independent, considered as of itself and enacted under the title "An act to prohibit the taking, wounding or killing of wild birds of any kind, at any time, within the state of Nebraska, and providing penalties for the violation of this act" (Laws 1877, p. 8), was to be considered, because of its substance and the effect of the provisions it contained, an amendatory statute, and subject to the constitutional limitations as such. The reason supporting this rule, as given by the court in this *Sovereign* case, is: "The evident object of this provision is to avoid the serious embarrassments which would arise in regard to conflicting rights, claims, and remedies, if statutes, amendatory in their character, could be passed as independent acts, no change being made in the statute amended, except so far as it may be in conflict with the amendatory act. This, if permitted, would introduce endless confusion and uncertainty into the law. To avoid the possibility of such legislation, the people by this constitutional provision have taken from the legislature the power to so amend a statute. The constitutional provision requires that, in all cases, the law as amended shall be given in full, with such reference to the old law as will clearly show for what the new law is substituted." See, also, *Smails v. White*, 4 Neb. 353, 357; *Stricklett v. State*, 31 Neb. 674; *Board of Education v. Moses*, 51 Neb. 288; *Copland v. Pirie*, 26 Wash. 481.

The wisdom of the reasons suggested by Judge Maxwell in *Sovereign v. State, supra*, as well as the public policy evidenced by the rule itself, finds ample support, not only in the widely diverse and conflicting interpretations of the language of the act under consideration by the truly learned opposing counsel who presented this case at the bar of this court in oral argument, but also clearly appears in the many briefs of the *amici curiæ* filed in this case.

The conclusion is that, notwithstanding its form, because of its substance and sole purpose, House Roll 345 is adjudged to have been passed in contravention of section 14, art. III of our Constitution, and is void. While it was suggested in oral argument at the bar of this court that certain of the funds in suit, including soldiers' relief, mothers' pensions, and funds for agricultural purposes, were of a nature that prevented control by the board of county commissioners, as here sought to be exercised, no such issue is made in the pleadings nor discussed in the briefs.

However, to the end that there may be no question as to the scope of this opinion, it may be said that the questions suggested are not decided, and the final order entered herein is without prejudice to their future consideration. A peremptory writ will issue.

WRIT ALLOWED.

LANDIS, District Judge, dissents.

IN RE ESTATE OF JOSEPH C. RHEA. COURTRIGHT, SIDNER, LEE & GUNDERSON, APPELLANT, V. ESTATE OF JOSEPH C. RHEA, APPELLEE.

FILED APRIL 6, 1934. NO. 28823.

1. **Executors and Administrators:** ATTORNEY'S FEES. Time devoted by attorneys to duties performed for the administrator of decedent's estate at an arbitrary charge for a day's service is not necessarily the measure of compensation allowable by the court.
2. ———. In proceedings to settle the estate of a deceased person, the administrator and his attorneys are officers of the court and both are fiduciaries in their relation to heirs.
3. ———: TRUSTS. An administrator of the estate of a deceased person is a trustee and property in his hands as such is trust property.
4. ———: ———. The estate of a deceased person in the hands of the administrator is trust property under the immediate control of the court.
5. ———: EXPENSES. The estate of a deceased person in the hands of the administrator as trustee is subject to the legiti-

mate expenses of administration, including proper attorney's fees, but it is the duty of fiduciaries who take part in the execution of the trust to be diligent in protecting the trust property from fraudulent or excessive claims and from misappropriations.

6. ———: ATTORNEY'S FEES. Services of an administrator and his attorneys in settling the estate of a deceased person are subject to judicial scrutiny and review.
7. ———: ———. Opinions of experts as to the value of services performed by attorneys for the administrator in the settlement of the estate of a deceased person must be considered on that issue but are not necessarily binding on the court.
8. ———: ———. In determining the compensation of attorneys for services performed for the administrator and heirs in the settlement of the estate of a deceased person, the court may consider the amount of property involved; the responsibility assumed; the questions of law raised; the time and labor necessarily required in the performance of duties; the result of services performed; the testimony of experts on value; the professional diligence and skill; the services of other counsel necessarily employed by heirs to protect them from active fraud and misappropriations of the administrator.
9. ———: ———. A fee for services by attorneys for an administrator in his individual capacity is not chargeable against the estate of decedent.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

Courtright, Sidner, Lee & Gunderson, pro se.

Abbott, Dunlap & Corbett and *Cook & Cook, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and MEYER, District Judge.

ROSE, J.

In a proceeding in the county court of Dodge county to settle the estate of Joseph C. Rhea, deceased, Courtright, Sidner, Lee and Gunderson, lawyers with offices in Fremont, filed claims for attorneys' fees aggregating $4,000 for their professional services. The county court allowed that amount and made a charge therefor against de-

cedent's estate. From the county court's allowance the heirs of decedent appealed to the district court for Dodge county, where the sum of $3,000 only was allowed. From this reduced allowance Courtright, Sidner, Lee and Gunderson, who will be called "plaintiffs," for convenience, appealed to the supreme court and the heirs of decedent took a cross-appeal from the allowance of $3,000.

Joseph C. Rhea died intestate May 7, 1929, leaving him surviving his widow, Helena T. Rhea, his daughters, Bessie L. Rhea, Hester Ann Hickey, Blanche E. Rhea, Marian R. Rhea, and his son, Mark R. Rhea. These were the only heirs. Live stock belonging to the estate required immediate attention of a special administrator. To serve in that capacity, Henry W. Schoettger was nominated by the heirs and was promptly appointed by the county court. They also engaged plaintiffs as attorneys to perform legal services in the settlement of the estate. The special administrator became the general administrator and acted as such throughout the proceedings. Plaintiffs, under their employment as attorneys, performed services from the time the application for the appointment of a special administrator was prepared by them, shortly after May 7, 1929, until the final account of the general administrator was filed December 28, 1931.

The record contains evidence tending to prove the following facts: For many years intestate had been engaged in buying, raising, feeding and selling live stock. Herds in which he was interested were kept in different pastures and feeding places in the counties of Holt, Rock, Brown, and Washington. Intestate was a member of four different partnerships engaged in his live stock business, but he did not leave records showing specific terms of each partnership or complete accounts of its affairs or of his own transactions. This increased the work of plaintiffs in performing their duties as attorneys. The illness of the widow, who spent part of her time in New York, also increased the difficulties of plaintiffs in obtaining necessary information. Encumbered real estate and leases re-

quired attention. More than 1,300 head of cattle, hogs and mules belonged to the estate. The first appraisement was completed November 25, 1929, and gave the total value of the estate as $143,948.95. A later appraisement contained an estimate exceeding $270,000 as the value of the gross estate. The outstanding liabilities were very large. Among them was a note for approximately $34,000, secured by a chattel mortgage on live stock.

As a witness for plaintiffs, Sidner, a member of their law firm, explained the difficulties encountered in the settlement of the estate, gave details of the services performed, including correspondence by letter, and testified:

"The total amount of the estate or cash handled was $203,587, and real estate $73,300. The appraisal made the gross $276,887. The claims filed against the estate were $79,744.81."

Sidner testified further that plaintiffs devoted 155 days to the performance of their duties; that reasonable compensation was not less than $25 a day; that $5,000 would have been a reasonable allowance for the services performed, though plaintiffs did not claim more than $4,000. In answering hypothetical questions experts generally estimated the value of plaintiffs' services at not less than $25 a day and their opinions of compensation for all services performed varied from $2,500 to $6,000. On testimony of this character and evidence of the arduous duties actually performed, it is insisted that compensation of $4,000 was conclusively established.

Time devoted by an attorney to duties performed for the administrator of decedent's estate at an arbitrary charge for a day's service is not necessarily the measure of compensation allowable by the court. Other factors may enter into the equation. Capable and conscientious counsel are known to vary in skill, accuracy, equipment, diligence and speed.

It is a sensitive judicial function to fix fees of counsel who perform professional services for an administrator and for heirs of a deceased person and to make the al-

lowance a charge against the estate. The administrator and his attorneys are officers of the court and both are fiduciaries in their relation to the heirs. An administrator is a trustee and property of the estate in his hands is trust property. 11 R. C. L. 19, sec. 2. He is both the personal representative of the deceased person and the trustee for the heirs and creditors. 11 R. C. L. 23, sec. 6. An estate in his hands is under the immediate control of the court. 11 R. C. L. 132, sec. 138. The trust estate is of course subject to the legitimate expenses of administration, including proper attorneys' fees, and it is the duty of fiduciaries who take part in the execution of the trust to be diligent in protecting the trust property from fraudulent or excessive claims and misappropriations. This requires services subject to judicial scrutiny and review. Opinions of experts as to the value of services performed by attorneys in the settlement of an estate must be considered on that issue but are not necessarily binding on the court. 2 R. C. L. 1061, sec. 147. The circumstances of each particular case should be considered. 11 R. C. L. 234, sec. 261. In a former opinion it was said:

"In determining what is a reasonable fee, we should take into account the amount of the property involved; the responsibility involved; the questions of law raised, whether intricate and difficult; the time and labor required for performing the services; the result thereof; together with the testimony of experts as to value. When the estate is a large one, honest as well as efficient service is always needed, and something must be paid for it, aside from the amount of labor required." *In re Estate of Thiede,* 102 Neb. 747.

In the proceeding now under consideration complications arose. A brother of intestate sued the administrator for a partnership accounting and pleaded a claim for $25,000. The partnership business involved in that suit had extended over a period of years. Plaintiffs, the attorneys for the administrator, were unable to discover

records or accounts or other evidence essential to a defense to the entire claim or to make a settlement with the claimant. The suit for an accounting was never forced to trial, though pending for a considerable time. Meanwhile, the heirs employed Clark O'Hanlon as special attorney to represent them in the partnership litigation and with his active aid the 25,000-dollar suit was settled for $2,500 within perhaps 90 days. The services of the special attorney were valuable and entered into the final settlement of decedent's estate.

Other complications grew out of protracted controversies over federal estate taxes and federal income taxes. Complete accounts or records of intestate's business and property did not fall into the hands of plaintiffs. Searches for information in different places were required to meet the demands of the revenue department of the federal government. The attorneys' services relating to revenue were performed principally by Gunderson, a member of plaintiffs' law firm. According to his estimate of time, 90 days were devoted to this work. His services were valuable and greatly reduced the claims for federal taxes, but one of his handicaps was the first appraisement of $143,948.95, as the value of the gross estate. This was far below actual value. The effect of the erroneous appraisement, if finally accepted, would have been to lessen the estate tax and to increase the income tax in a greater proportion. There is evidence tending to prove that the appraisers in the first instance made a long trip to a cattle ranch but did not see the cattle there, and that Lee, a member of plaintiffs' law firm, accompanied the appraisers. A new appraisement became necessary and, when made, fixed the value of the gross estate at $276,887, according to Sidner's testimony. Plaintiffs' services relating to income taxes were performed for months with the erroneous appraisement of $143,948.95 a disturbing factor. It may fairly be inferred from the evidence that much of the time devoted to searches for information and to conferences and hearings would have been unnecessary,

had counsel at the beginning insisted on a new appraisement and inquired at the revenue department for the last income tax statement of intestate himself.

The settlement of the estate was further complicated by more serious problems. The administrator was the principal stockholder and also the managing officer of the Arlington State Bank at Arlington, in Washington county. The home of intestate and the offices of plaintiffs were in Dodge county, at Fremont. The administrator, acting for himself, for the bank and for the heirs kept in the bank at times large deposits of trust funds belonging to the estate without charging himself with any interest thereon or any income therefrom. He lent the bank $4,500 belonging to the estate without an order of court or a notice to the heirs. In doing so he failed to exact from the bank a note or a certificate of deposit or any other evidence of the loan, but indicated the transaction by a mere slip of paper and a charge against the bank. He misappropriated about $3,000 of the estate's trust funds and attempted to conceal his lawlessness by means of spurious paper. He took other large sums belonging to the estate and replaced the amount taken with worthless or unsecured notes held by the bank. He furnished his attorneys, plaintiffs, with accounts and data crediting himself with items not lawfully chargeable against the estate. Improper items in his favor were included in the final report of the administrator as first drawn by Sidner. Thereafter interests of the heirs conflicted with claims of the administrator for whom plaintiffs continued to act. The heirs employed Abbott, Dunlap and Corbett as special counsel to represent them in the further proceedings. Special counsel objected to confirmation of the final report as originally drawn. Plaintiffs made no claim against the estate for attorneys' fees for services performed by them after the filing of the final report in the county court, but, as stated, continued to perform services for the administrator. Sidner explained on the witness-stand that he was not a detective; had no knowledge or notice of the

fraud when he prepared the final report as first drawn; reposed confidence in the administrator who had borne a good reputation as a banker with his place of business in another county; relied on his bond to protect the estate; required the administrator to account for all the funds belonging to the estate, including interest and eliminating compensation for the administrator's services. As revised, the final report was confirmed by the county court, leaving nothing open to controversy except the allowance to plaintiffs for their fees. The evidence shows without dispute that plaintiffs are skilful, well equipped lawyers in good standing. There is nothing in the record to challenge their integrity or their good faith or their willingness to perform professional duties. It is clearly shown, however, that the vigilance of the heirs and of the special counsel employed by them at different times exceeded the diligence of plaintiffs in preventing delays, in discovering the fraud of the administrator and in protecting the estate from what otherwise would have resulted in grievous losses.

Ordinarily, services performed by attorneys for the administrator make the employment of special counsel for the heirs unnecessary, but in the present proceedings the situations justified the heirs in employing special counsel on their own initiative and the resulting work was a substantial and valuable part of the settlement of the estate.

The fraud and the lawlessness of Henry W. Schoettger were not services performed by him as administrator but were his individual wrongs. When plaintiffs were misled by Schoettger into inserting in his final account illegal items in his favor, the attorneys' services in that particular were not performed for the administrator in his representative capacity but for the individual whom the county court appointed administrator. The law is that a fee for services by attorneys for an administrator in his individual capacity is not chargeable against the estate of decedent. *McDowell v. First Nat. Bank of Sutton*, 73 Neb. 307; *Goode v. Reynolds*, 208 Ky. 441, 63 A. L. R. 631.

When the evidence is considered from every standpoint in connection with the surrounding circumstances, the district court's allowance of $3,000 for the services performed by plaintiffs for the administrator and the heirs, without regard to the reasons given below, seems to be fair and reasonable compensation. In this view of the controversy over attorneys' fees, plaintiffs are not entitled to have that allowance increased on appeal and the heirs are not entitled to have it reduced on cross-appeal. Affirmed at the costs of plaintiffs.

AFFIRMED.

GOOD, J., dissenting.

I am unable to concur in the majority opinion, not as to any principle of law announced, but I think the facts show that the vast amount of work performed by the attorneys, together with the large amount involved, and the great responsibility entailed, entitled the attorneys to a fee of $4,000, as allowed by the county court.

EBERLY, J., concurs in this dissent.

STACY HENSLEY, APPELLANT, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLEE.

FILED APRIL 6, 1934. No. 29043.

1. **Appeal**: LAW OF THE CASE. A material ruling by the supreme court on appeal, resulting in the reversal of a judgment, ordinarily becomes the law of the case in subsequent proceedings, including a second appeal.
2. **Pleading**: AMENDMENT. An amendment of a petition after trial, judgment, appeal and reversal, if amounting to a departure from law to law and from fact to fact, thus introducing a new cause of action long since barred by the statute of limitations, is not allowable.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed.*

Rosewater, Mecham & Hasselquist and *Donald S. Krause*, for appellant.

Wymer Dressler, Robert D. Neely, Hugo J. Lutz and *Paul S. Topping, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and MEYER, District Judge.

ROSE, J.

This is an action to recover damages in the sum of $30,000 for personal injuries. Defendant is a common carrier operating a railroad and engaged in both interstate and intrastate commerce. Plaintiff was a section hand. While engaged in the line of his employment by defendant, unloading scrap iron from a flat-car onto a storage platform at Emerson, he stepped onto the wheel of a disappearing hand brake to look into an adjacent gondola car to see what tools would be needed in removing scrap iron therefrom. His weight suddenly forced the brake shaft downward through its sleeve until the brake wheel was flush with the floor of the flat-car. Plaintiff fell between the cars and was injured. He alleged in his petition that he got upon the brake wheel carefully with due regard to, and in line of, his duty "as prescribed by the defendant," and that defendant kept the brake wheel and all the parts on which it rested in a "careless, negligent, unsafe, loose, shaky and wabbly condition," and that by reason thereof he sustained the injuries of which he complains. He pleaded his case solely under the federal employers' liability act. Defendant denied that plaintiff was engaged in interstate commerce when injured. Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $14,000. From judgment therefor defendant appealed. Upon a review of the proceedings and judgment of the district court, the issues and evidence were fully considered, and it was held that plaintiff was not engaged in interstate commerce when injured and that therefore he was not entitled to recover damages

under the federal employers' liability act. The judgment of the district court in favor of plaintiff was reversed and the cause remanded for further proceedings consistent with the opinion of the supreme court. The case as originally pleaded and tried and the law applicable thereto were explained at length in the former opinion, making further repetition in this preliminary statement unnecessary. See *Hensley v. Chicago, St. P., M. & O. R. Co.*, 118 Neb. 690.

Long after the cause reappeared in the district court pursuant to the mandate of the supreme court, plaintiff moved to amend his petition on the ground that, as originally drawn, it permitted him to recover damages under both federal and state laws, independently of the federal employers' liability act. The motion to amend was overruled and the action dismissed. Plaintiff appealed.

Did the district court err in overruling the motion to amend the petition and in dismissing the action? Following is a chronology of events: September 28, 1923, plaintiff injured; April 27, 1925, action for damages commenced; March 20, 1926, judgment in favor of plaintiff for $14,000; July 2, 1929, reversal in supreme court; August 19, 1929, mandate issued; November 25, 1929, motion by defendant in district court to dismiss action; February 15, 1933, action dismissed; May 24, 1933, motion by plaintiff to vacate dismissal and amend petition; October 16, 1933, dismissal set aside and action again dismissed; November 7, 1933, appeal from dismissal taken to supreme court.

On the former appeal there was an adjudication that plaintiff did not prove a cause of action under the federal employers' liability act. It will be observed that the motion to amend the petition was made nine years after the accident and eight years after the action was commenced. It is clear, therefore, that a cause of action under the federal safety appliance act or state laws, if first stated by an amendment of the petition, would be barred by the statute of limitations. One of the amend-

ments offered by plaintiff, if allowed, would have changed the word "interstate," where it is used in the petition, to "intrastate." The effect of this would have been to change the petition to allege that plaintiff was engaged in intrastate commerce instead of interstate commerce, when injured. Another amendment, if allowed, would have changed the petition to allege that plaintiff was "ordered and directed" to get upon the brake wheel.

Plaintiff argues that the facts constituting the actionable wrong were pleaded in the petition as first drawn and that he has a right to recover under the common law in force in Nebraska and under the Nebraska railroad employers' liability act and under the federal safety appliance act. It is further argued that the amendments would not introduce a new cause of action and that they should be allowed without regard to the lapse of time since the action was brought. This position seems to be untenable in view of the record and proceedings now presented for review. In reaching this conclusion, it has not escaped attention that, on February 5, 1934, the supreme court of the United States held that an interstate carrier's employee, if injured in interstate commerce, may bring an action under the federal employers' liability act in connection with safety appliance acts and predicate actionable negligence on a violation of the latter acts. *Moore v. Chesapeake & O. R. Co.*, 78 U. S. L. Ed. 488. It has also been observed that, in another recent decision by the same court, "A change of the legal theory of the action, 'a departure from law to law,'" recognized in *Union P. R. Co. v. Wyler*, 158 U. S. 285, was not accepted as a test of general validity, and a more liberal rule, permitting amendments of petitions to allow recovery under statutes not originally pleaded, was adopted. *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62. The record now under consideration, however, prevents the application of those rulings to the present controversy.

The principle stated in the *Wyler* case was recognized in *Westover v. Hoover*, 94 Neb. 596. A Nebraska statute permits a change in a pleading, "when the amendment does not change substantially the claim or defense." Comp. St. 1929, sec. 20-852. The motion herein to amend the petition was made after trial, judgment, appeal and reversal. Amendments which change the nature of the action will not be allowed after judgment. *Scott v. Spencer*, 44 Neb. 93. Plaintiff went to trial on his own petition on the sole ground that he was injured in interstate commerce and that his right to recover rested on the federal employers' liability act alone. The case was tried and adjudicated on that theory. It was so presented and determined on appeal. In the original petition and at the trial there was no "claim" under any other law. Defendant was not required to answer or defend any different claim or plea under any other statute. In reviewing the proceedings and judgment under the original petition, the supreme court of Nebraska held that causes of action and defenses under the statutes upon which plaintiff now relies are different from the cause of action first pleaded under the federal employers' liability act, and that plaintiff "must either stand or fall upon the proposition that he is entitled to recover under that act." *Hensley v. Chicago, St. P., M. & O. R. Co.*, 118 Neb. 690. This, according to a general rule, is the law of the case in subsequent proceedings and upon a second appeal. In the light of the former rulings and adjudication, the amendments, if allowed, would amount to a departure from law to law and to a departure from fact to fact and introduce a new cause of action long since barred by the statute of limitations.

AFFIRMED.

ANDREW L. ANDERSON, APPELLEE, V. JOE SVEHLA ET AL., APPELLANTS.

FILED APRIL 6, 1934. No. 28799.

1. **Evidence** examined and *held* to disclose no actionable negligence.
2. **Master and Servant:** ASSUMPTION OF RISKS. In absence of master's negligence, his servant assumes the risks of injury incident to employment, where such risks are obvious and known to him.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Reversed.*

C. A. Magaw, George C. Holdrege, Thomas F. Hamer and *Thomas W. Bockes,* for appellants.

W. W. Slabaugh and *George Evens, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY, District Judge.

GOOD, J.

This is a personal injury action in which plaintiff had judgment, and defendants have appealed.

Plaintiff alleged that, while employed by defendant railway company, he was ordered by his foreman, defendant Svehla, to assist his fellow employees in lifting a heavy freight car bolster under a freight car, then being repaired in the yards of the defendant railway company; that, while lifting one end of said bolster, defendant Svehla and other employees carelessly, negligently and without notice or warning caused the steel bolster, one end of which plaintiff was lifting, to suddenly and violently fall, thereby greatly increasing the weight which plaintiff was lifting, and to such an extent that it suddenly and violently crushed, wrenched, twisted and bore down on the body of plaintiff, thereby injuring him.

The specific acts of negligence were alleged as follows: That the foreman and other employees of defendant railway company neglected to have the bolster properly sup-

ported so that it would not drop, slip and jerk, and injure the plaintiff; that they were careless and negligent in that they ordered and directed the plaintiff to work and lift on said bolster while it was improperly braced, supported and fastened, so that it could not slip, fall, jerk and injure the plaintiff; that they were careless and negligent in that they supplied insufficient help for the plaintiff in raising the aforesaid bolster; that they were careless and negligent in that they provided incompetent help for the plaintiff in raising and hoisting said bolster; that they were negligent in failing to give plaintiff any notice or warning of the danger of its slipping or falling while plaintiff was performing his work, as ordered by the foreman.

Defendants answered jointly, denying any knowledge that plaintiff had ever been injured as claimed by him; admitted his employment, and alleged that plaintiff assumed the risks of any injury in the work which he was performing.

Plaintiff testified that he had been in the employ of defendant railway company for a period of nearly seven years, working as a car carpenter in repairing freight cars, and that he worked in what was ordinarily termed the "wood gang;" that there was another gang of workmen known as the "steel gang," which installed steel bolsters in cars requiring such repairs; that on an average of four or five times a year, during his employment, he had been called to assist in placing a steel bolster under a car which was being repaired; that he was familiar with the way such work was done; that, in the present case, when he was called to assist, the bolster had been lifted up and placed upon a jack, being 30 or 32 inches above the rails of the railroad track; that, while fitting the bolster to its place, it was necessary that each end thereof should be fitted into a pocket or slot on the underside of the side sills of the box car; that he, alone, had hold of one end of the bolster, while other workmen at the other end were endeavoring to place their end into the pocket or slot;

that the jack under the bolster was near its center; that when the end on which the others were working went into the pocket or slot, that end would be raised up from four and one-half inches to six inches, and that the end on which he was working would be correspondingly lowered to the same extent; that, in performing this work, he was standing nearly upright, with his head resting against the side of the box car, lifting his end of the bolster, and that when his end went down from four and one-half to six inches plaintiff was injured, in that his fifth cervical vertebra was fractured on the inner or front side, and his spine was otherwise injured; that his injuries were serious and permanent.

From a careful examination of all the evidence, we fail to find any evidence tending to show that the bolster was not properly supported and braced, or any evidence that it slipped or fell, except the end slipping into the pocket, where it was designed to go; nor do we find any evidence that it was improperly braced or improperly supported; nor is there any evidence that more help was required at the end where plaintiff was working; nor is there any evidence that any of the workers employed were incompetent. Plaintiff was familiar with the work being done, and knew that one end of the bolster was to be adjusted so as to slip in or fit into the pocket; that that end would rise to the extent of the depth of the pocket, and the end which he was holding would be lowered to the same extent. The evidence shows nothing occurred that was not ordinarily anticipated. There is no evidence which would sustain the finding of any actionable negligence on the part of defendants, or either of them.

Whatever dangers there were attendant on the work which plaintiff was called upon to perform were obvious and known to him. In the absence of negligence, a servant assumes the risks of injury incident to his employment, where the risks are obvious and known to him.

There are other errors assigned, but, in view of the conclusion reached, it is unnecessary to discuss them.

It necessarily follows that the judgment of the district court must be and is reversed, and the cause remanded.

REVERSED.

BEGLEY, District Judge, having died on March 4, 1934, did not participate in the adoption of this opinion.

JOHN J. KLINE, APPELLANT, v. DEPARTMENT OF PUBLIC WORKS ET AL., APPELLEES.

FILED APRIL 6, 1934. No. 28867.

1. Waiver of Damages: RESCISSION. Waiver of damages, procured by material misrepresentations, on which the grantor relied, is voidable at the option of the grantor, and may be rescinded at any time before it is acted upon by grantee.
2. ———: ———. A waiver executed without consideration may be withdrawn at any time before it is acted upon.
3. Equity. Laches should be pleaded, to be available as a defense.

APPEAL from the district court for Thurston county: MARK J. RYAN, JUDGE. *Reversed.*

Sidney T. Frum, for appellant.

Paul F. Good, Attorney General, Paul P. Chaney and *Robert G. Fuhrman, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and REDICK, District Judges.

GOOD, J.

This is an action to enjoin defendants from entering upon and constructing a highway across plaintiff's land, and to cancel certain waivers of damages signed by plaintiff. The trial court gave judgment for defendants, and plaintiff has appealed.

On oral argument in this court it was admitted that since the trial below the highway has been constructed across plaintiff's land, and the only question for determination in this court is the right of plaintiff to a cancela-

tion of the waivers, so that he may maintain an action for damages.

This is an action in equity, and, on appeal, this court is required to try the case *de novo* and to reach an independent conclusion as to what findings are required under the pleadings and all the evidence. Comp. St. 1929, sec. 20-1925.

From a consideration of all the evidence, we find that a preponderance thereof shows the following facts: Several citizens of Walthill and Winnebago were desirous of having a federal aid highway constructed between Winnebago, in Thurston county, and Decatur, in Burt county. A number of these citizens interviewed the officers of the department of public works in Lincoln and were informed that such a highway might be constructed provided a right of way could be procured without cost to the state. Thereupon, several of the interested parties set out to procure waivers of damages for the right of way for the proposed highway. Some time in 1931,—the exact date not disclosed,—plaintiff, the owner of 240 acres of land in the vicinity of the route of the proposed highway, executed a waiver of damages for the right of way which contained this provision: "I sign this waiver, with the understanding that highway follows a N-S or a E-W line and not angle across the land." September 4, 1931, one of the interested citizens interviewed plaintiff at the latter's office in Sioux City, Iowa, and requested him to sign another waiver. He informed plaintiff that the highway would go along the west line of a certain 80-acre tract of plaintiff's land, and that a strip 33 feet wide would be required. Plaintiff signed the waiver. February 6, 1932, another of the interested citizens visited plaintiff at his office in Sioux City and requested him to sign another waiver, stating that the former waiver had been lost; that the one presented was a duplicate of the former, and that there had been no change in the proposed route of the highway. Plaintiff executed this waiver February 6,

1932. No consideration was paid, or promised to be paid, to plaintiff for any of the waivers.

About February 8, 1932, one Alam, a tenant in possession of plaintiff's land, visited plaintiff and informed him that the survey for the highway ran diagonally through the 80-acre tract and not along the west line thereof. Plaintiff became excited and immediately called upon one of the parties, who had procured the waivers, and stated that he did not then know or understand that the highway was to cross his land diagonally, but believed it was to take a strip along the west side of the land. He asked to have the waiver returned, and asked if it would be necessary for him to institute legal proceedings to obtain it. He was informed that the waiver would be procured and returned to him. February 12, 1932, plaintiff wrote to the department of public works in Lincoln, in which letter he stated that he had signed the waiver February 6, 1932, with the fixed understanding that the amount of land required would be 33 feet on the section line; that, after signing the waiver, he learned that the survey cut across the 80-acre tract in a diagonal direction. He gave a description of the land and asked for a return of the waiver, requesting, if it could not be obtained, that he be so advised, that he might start legal proceedings to cancel it. February 15, 1932, the department of public works answered as follows: "In reply to your letter of recent date with reference to waiving of right of way, this is to advise that these matters are handled entirely by Mr. E. W. Rossiter, of Winnebago, the agreement with this department being that all right of way forms would be furnished and that waivers would be obtained before any work proceeded." Mr. Rossiter was one of the persons soliciting waivers from plaintiff. The waivers were not returned or canceled.

January 22, 1932, the highway department made a project statement to the United States government, containing the general route of the highway and a rough esti-

mate of the cost. October 10, 1932, plans were finally approved by the United States government. October 31, 1932, project agreement between the United States government and the department of public works was approved. Preliminary survey for the route of the highway was started September 26, 1931, and completed November 10, 1931. The preliminary survey across the land of plaintiff occurred October 28, 1931. The survey for the actual work across plaintiff's land was made on the 13th of January, 1932. Plaintiff was not aware that the proposed highway was to cut diagonally across his 80-acre tract until after the signing of the waivers.

From the facts we conclude that plaintiff was induced to sign the waivers by misrepresentations as to the location of the highway and relied upon such misrepresentations to his injury; that the waivers were voidable at his election; that he did elect to avoid and cancel the waivers prior to the time any road was established or contract let for the construction of the highway. The highway department, itself, was not guilty of any fraudulent misrepresentations, but it is chargeable with the instrumentalities employed by the persons acting for it in obtaining the waivers. *McKeighan v. Hopkins,* 19 Neb. 33; *Rogers v. Empkie Hardware Co.,* 24 Neb. 653; *Armstrong v. Randall,* 93 Neb. 722; *Krause v. Stevens,* 103 Neb. 463.

Waiver of damages, procured by material misrepresentations, on which the grantor relied, is voidable at the option of the grantor, and may be rescinded at any time before it is acted upon by grantee. A landowner, who has signed an instrument waiving compensation for damages, arising from the establishment of a public road, may withdraw such waiver at any time before the establishment of the road. *Ashley v. Burt County,* 73 Neb. 159.

Apparently the trial court based its conclusion upon the proposition that plaintiff was guilty of laches in bringing his action and was not entitled to prevail. Before any contract was let or work done towards the construction of the highwav, other than the preliminary survey, de-

fendant was informed that plaintiff had been misled and was demanding a cancelation and return of the waivers which he had executed. Defendant was fully advised as to plaintiff's contention that the waivers were voidable and that he had elected to cancel them. It proceeded with the construction of the highway at its peril, so far as plaintiff's rights are concerned. It is a general rule that time alone, unaffected by other circumstances, will not bar the right to rescind a voidable transaction. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463. Moreover, laches is an affirmative defense and should be pleaded. We fail to find in the answer any allegation of fact to indicate that defendant relied upon laches as a defense.

We reach the conclusion, and it is our judgment, that the waivers executed by plaintiff should be and they hereby are canceled and held for naught.

JUDGMENT REVERSED.

JUSTINA C. CAREK, APPELLEE, V. HERMAN J. SCHMIDT ET AL., APPELLANTS.

FILED APRIL 6, 1934. NO. 28913.

1. **Bills and Notes**: CANCELATION: DURESS. One who involuntarily signs note and assignment of an insurance policy to bank may have them canceled in suit in equity where she was induced to execute note and assignment by suggestion of officer of bank that unless she did so her brother would be arrested and sent to prison and that she herself would be involved.
2. ———: ———: ———. In this case plaintiff herself was not in fact involved and the actual guilt of her brother is immaterial where she was compelled to sign by officers of bank to which note was payable, causing her first to fear his arrest and imprisonment and then to hope that this would be avoided if she signed the note and executed the assignment of the insurance policy.
3. **Contracts**: DURESS. "Any wrongful influence designedly exerted by an interested party and producing a condition of mind

that deprives the other party of the exercise of his free will may amount to duress and invalidate a contract signed while the influence prevails." *Farmers State Bank v. Dowler*, 112 Neb. 262.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Affirmed.*

H. A. Bryant and *Charles H. Hood*, for appellants.

Charles H. Slama, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and MESSMORE, District Judge.

DAY, J.

On October 8, 1928, Justina C. Carek signed a note for $5,000 in favor of the Oak Creek Valley Bank and at the same time executed an assignment to the same bank of a life insurance policy. She brings this suit to cancel note and assignment of insurance policy alleging that they were obtained by fraud, coercion, duress, pressure, fear, and persecution overcoming her will. The trial court found for plaintiff, ordered cancelation of the note and assignment, and return of the policy to plaintiff.

The transaction arose in connection with the State Bank of Touhy. The State Bank of Touhy, the Oak Creek Valley Bank, and the Saunders County National Bank of Wahoo were all controlled and under the management of F. J. Kirchman. C. C. Carek, brother of the plaintiff, was for some years cashier of the State Bank of Touhy, and in October, 1928, was unable to account in full for the funds of the bank. Justina C. Carek was as a girl of 17 employed in the Touhy State Bank in 1920, and she continued to work there regularly until the spring of 1928, when she was unable to do so on account of her health. She was employed in the bank to do clerical work and was not an officer and had nothing to do with the management of the bank. It fairly appears from the record that she was in no way connected with the shortage of her brother. On Sunday afternoon, October 7,

1928, following a telephone conversation between Petermichel and Carek, Carek accompanied by his wife and his sister, the plaintiff, went to Petermichel's home in Valparaiso for a conference. The purpose of this visit was to discuss C. C. Carek's shortage to the bank of Touhy. The plaintiff and her sister-in-law, Mrs. Carek, testified that Petermichel insisted upon the plaintiff giving this note and assignment of the insurance policy to raise a part of the money to cover this shortage, stating that, if plaintiff failed to do so, her brother would go to prison, and that she might also be involved, because she had worked in the bank. The plaintiff had been very ill for six months, confined, except for a small portion of each day, to her bed. Under these conditions and circumstances, she agreed to execute the note and the assignment, whereupon Petermichel told her to call upon F. J. Kirchman at the Saunders County National Bank after banking hours the next day and fix the matter up. Petermichel and Kirchman were managing officers of both banks. The following afternoon, October 8, the plaintiff went to the Saunders County National Bank to see Mr. Kirchman as directed by Petermichel. She was taken into the bank about 5 o'clock in the evening, after banking hours, by Mr. Kirchman, who talked to her along very much the same line as Petermichel had the day before. She testified that she was very ill and nervous and somewhat hysterical, and that Mr. Kirchman directed her to go to the rest room and compose herself. At that time she signed the note and the assignment of the policy, and in addition she signed an exhibit in the record authorizing the Oak Creek Valley Bank to pay to her brother the proceeds of the $5,000 note which was given to assist her brother who was in financial straits. This statement also declares that it was signed of her own free will and accord, without solicitation on the part of the Oak Creek Valley Bank, and further that no officer of the State Bank of Touhy, of the Saunders County National Bank of Wahoo, or of the Oak Creek Valley Bank requested or

solicited her to sign said note. It seems to be a fair inference that this statement was required to meet the contention which the plaintiff has raised in this case, that at that time F. J. Kirchman anticipated that such a contention might be made. Comment upon this statement is unnecessary: It "doth protest too much." The note, the assignment of the insurance policy, and this statement were signed in the presence of F. J. Kirchman and his son-in-law, who witnessed the statement and acknowledged the assignment of the insurance policy as a notary public. It is significant that neither Kirchman nor Petermichel denies unequivocally the testimony of the plaintiff. A résumé of their testimony, as found in the appellants' brief, is: "Petermichel says that he didn't make the statements in the manner she testified to, and Kirchman says that he doesn't believe he made the statements which she claims he did." This court finds, as did the trial judge, that the note was procured in substantially the manner alleged by plaintiff. On October 8, 1929, the original note having become due, the plaintiff signed a new note for the same amount. The plaintiff made some objection to signing this note, but Petermichel insisted that she sign it, saying that, if she did not, it would open up the whole matter of her brother's defalcation again. This fairly presents the circumstances surrounding the execution of the note and leaves only for determination the effect upon the validity of the instruments. In *Hargreaves v. Korcek*, 44 Neb. 660, it was held: "Threats of prosecution and immediate imprisonment of the husband, when used to induce a man and his wife to execute and deliver a mortgage upon their homestead to secure the payment of a judgment against him, where the threats so overcome their wills as to induce them to affix their signatures to such mortgage and thus give a security which they would not voluntarily have executed, are sufficient to constitute duress and avoid the operation of the instrument so obtained." In *Hoellworth v. McCarthy*, 93 Neb. 246, this court held that a married woman was entitled to have a

lien canceled where she had involuntarily mortgaged her separate estate, where she was induced to execute a mortgage by threats to imprison her husband. Petermichel conferred with the plaintiff approximately two hours on Sunday afternoon, and as a result of this conference, she went to Wahoo the next day and completed the transaction after a conference with Kirchman and his son-in-law, at which conference her brother was not present. One who involuntarily signs note and assignment of an insurance policy to bank may have them canceled in suit in equity where she was induced to execute note and assignment by suggestion of officer of bank that unless she did so her brother would be arrested and sent to prison and that she herself would be involved. In this case plaintiff herself was not in fact involved and the actual guilt of her brother is immaterial where she was compelled to sign by officers of bank to which note was payable, causing her first to fear his arrest and imprisonment and then to hope that this would be avoided if she signed the note and executed the assignment of the insurance policy. *Beindorff v. Kaufman,* 41 Neb. 824.

The appellants contend that the execution of a renewal note was a recognition of the original note as valid. Numerous cases are cited to support this contention which we have not examined because not applicable to this case. The record discloses that there was a continuing threat used to compel plaintiff to sign the renewal note. If she did not sign it, the whole matter of her brother's defalcation would be reopened. In *Farmers State Bank v. Dowler,* 112 Neb. 262, this court discussed this proposition and held: "Any wrongful influence designedly exerted by an interested party and producing a condition of mind that deprives the other party of the exercise of his free will may amount to duress and invalidate a contract signed while the influence prevails." In the case at bar, the original note was secured by duress in that the interested party produced a condition of mind that deprived the plaintiff of her free will and this condition prevailed

even to the time when the renewal note was executed. The note and the assignment of the insurance policy should be canceled and the insurance policy ordered returned to the plaintiff.

The argument that the Oak Creek Valley Bank parted with money for this note to make up Carek's shortage in the Touhy bank is without any legal effect in this case, since the managing officers of one bank were also managing officers of the other, and we have repeatedly held that the knowledge of officers of a bank is the knowledge of the bank. These same officers procured this note by means of duress. The bank could not have collected and the receiver of the bank and the depositors' committee to whom the receiver assigned this note are in the same situation. This unsatisfactory transaction with its irregularities, and its consequences, must be charged to the officers of the bank, and not to this plaintiff.

AFFIRMED.

MERCANTILE INSURANCE COMPANY, APPELLEE, V. ERRETT WILES ET AL.: LUDWIG H. PAULEY ET AL., APPELLANTS.

FILED APRIL 6, 1934. No. 28874.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Harry R. Ankeny, for appellants.

Sam C. Zimmerman and *Crofoot, Fraser, Connolly & Stryker, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

CHAPPELL, District Judge.

This is a suit in equity to foreclose a real estate mortgage. In its petition plaintiff, appellee herein, alleged

ownership of the bonds and mortgage by assignment from the Lincoln Safe Deposit Company, and that the mortgagors, Errett Wiles and Lucille E. Wiles, husband and wife, and the subsequent owners, Ludwig H. Pauley, L. Albertina Pauley, husband and wife, and the Pauley Lumber Company, impleaded as defendants, who took the property subject to plaintiff's mortgage have failed to pay the mortgage debt as covenanted, and prayed for foreclosure.

Demurrer of defendants Ludwig H. Pauley, L. Albertina Pauley and the Pauley Lumber Company was overruled by the court, and defendants filed answer in which, after admitting certain allegations of the plaintiff's petition, they denied generally and specifically all other allegations contained therein. Defendants Errett Wiles and Lucille E. Wiles were never served with summons and the action was dismissed as to them.

Upon trial of the issues presented the court found generally for the plaintiff and against defendants. They appeal, relying for reversal upon the propositions that the court erred in admitting in evidence certain exhibits and in finding in its decree that the Lincoln Safe Deposit Company executed and delivered to the plaintiff herein an assignment of the mortgage and bonds secured by it, and that, by virtue of the assignment and delivery, plaintiff became the owner of the mortgage and entitled to secure payment of the bonds secured by the mortgage by foreclosure thereof.

From a careful examination of the bill of exceptions, we conclude that the exhibits were properly admitted in evidence; that the decree is amply supported by the evidence, and that it is responsive to the pleadings filed herein.

The judgment of the district court is

AFFIRMED.

E. H. LUIKART, RECEIVER, APPELLANT, V. CONTINENTAL NATIONAL BANK, APPELLEE.

FILED APRIL 6, 1934. No. 29082.

1. **Account Stated.** An account stated is an agreement between parties who have had previous transactions of a monetary character that all items of account representing such transactions, and the balance struck, are correct, including a promise, express or implied, for the payment of such balance.
2. ———. Minds of parties must meet in stating an account like any other agreement.
3. **Trial.** Motion for directed verdict admits all material and relevant evidence, together with proper inferences therefrom.
4. **Account Stated.** Court properly directed verdict in action on account stated where testimony merely disclosed that exhibit furnished by bank to receiver of bank carrying an account therein was tentative and submitted for ten days' consideration of errors, within which period a controversy arose in respect to debits to be credited against account.
5. **Trial.** Whether party may withdraw his rest and introduce further testimony rests within sound discretion of trial court.
6. **Witnesses.** Letter to receiver of bank suing on account stated *held* properly received as part of cross-examination of assistant to receiver in charge of failed banks, in view of the fact that it was not questioned that letter was genuine; that it was received and was part of controversy between parties.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Clarence G. Miles, F. C. Radke and *Barlow Nye,* for appellant.

Beghtol, Foe & Rankin, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LANDIS, District Judge.

LANDIS, District Judge.

Action by appellant, E. H. Luikart, as receiver of Farmers & Merchants State Bank of Benkelman, Nebraska, against appellee, Continental National Bank of Lincoln, Nebraska, upon an account stated. A verdict was

directed below in favor of defendant appellee; motion for new trial overruled, and the receiver appeals.

The record discloses appellant was appointed receiver November 9, 1931. On December 22, 1931, appellee was written to as follows: "We wish to close the account of the Farmers & Merchants State Bank, Benkelman, Nebraska. Please send us a draft or cashier's check payable to E. H. Luikart, Receiver, for the balance as shown by your books. When the account is closed, please send us the final statement. Very truly yours, Receivership Division, by Camella Willadsen." On January 4, 1932, appellee wrote appellant: "In accordance with your request we have closed the account of the Farmers & Merchants State Bank, Benkelman, Nebraska, and are pleased to inclose our cashier's check No. 62031 for $128.37 being the balance due in accordance with the statement inclosed. The charge of $15,908.72 represents principal and interest at 6 per cent. on notes as per list inclosed which we have been carrying for the Farmers & Merchants State Bank of Benkelman, and which we return herewith by registered mail. Please acknowledge receipt of the inclosed notes and oblige. Yours very truly, R. C. Johnson, Ass't. Vice-President."

From January 4, 1932, to April 6, 1932, there were numerous conferences between the representatives of the receiver and the appellee bank over the debit items of the account. About January 19, 1932, the appellee conceded that one of the debit items was incorrect and paid the receiver therefor $3,735.03 and took back this item. At this time there was no agreement on the remainder of the debit items.

There was a continued controversy over the debit items, and no agreement was ever reached thereon, except as to the one item paid by appellee. On April 6, 1932, the receiver writes the appellee setting up the history of the transactions up to that time, refuses to concede the debit items, and closes the letter with: "The undersigned hereby surrenders all of the above notes to your bank on the

theory that this property belongs to your bank, and the undersigned receiver of the said Benkelman bank hereby demands the payment to him by your bank of the sum of $12,302.06 together with interest thereon at seven (7) per cent. from December 23, 1931, being the amount of balance and credit due the said Benkelman bank as a depositor in your bank."

The appellee sent on the last day of each month a regular form statement to all the country banks having deposits with it. Exhibit 1 is such a statement, as follows: "Farmers & Merchants State Bank, Benkelman, Nebraska. In account with the Continental National Bank, Lincoln, Nebraska. Statement of your account for month of ————. Please examine at once. If no error is reported in ten days, this account will be considered correct." Then appears debit and credit columns, and under the debit column no entries are made, while under the credit column appears "Bal. Ford. Nov 28 16,017.36, Dec 28 19.73, Dec 30 1931 16,037.09." Exihibit 1 was mailed by appellee about January 1, 1932, to the bank at Benkelman, checked there by appellant's agent in charge of the bank and then forwarded to appellant in Lincoln. Agents of the appellant found exhibit 1 in the files of the receivership division some time in January, 1932. The representative of the receiver who had supervision of this particular matter, with his assistants, testify that accuracy of the credit items on exhibit 1 was never questioned by them; to their knowledge no one connected with the appellant ever did; that the only controversy that ever existed with appellee was over the debit items; that as to these there were continuous controversies from January 4, 1932, to April 6, 1932, and that there was never any agreement on these items.

Receiver claims exhibit 1 was an account stated between the parties, presenting this sole claim by his petition. An account stated is an agreement between the parties who have had previous transactions of a monetary character that all the items of the account representing

such transactions, and the balance struck, are correct, including a promise, express or implied, for the payment of such balance. *Hendrix v. Kirkpatrick,* 48 Neb. 670; *Jorgensen v. Kingsley,* 60 Neb. 44; *Haish v. Dillon,* 71 Neb. 290. In stating an account, like any agreement, the minds of the parties must meet. *Hendrix v. Kirkpatrick, supra; Haish v. Dillon, supra.*

There is no issue in this case as to the justness or legality of the debits claimed by the appellee. The sole issue is: Does exhibit 1 create an account stated? A motion for a directed verdict admits all the material and relevant evidence, with proper inferences therefrom, and if there was any evidence from which the jury might find that there was an account stated, then there was error in directing a verdict.

We think the trial court properly directed a verdict under the evidence. Considering all the contemporaneous facts and circumstances, there was no account stated between the parties. There was no agreement, express or implied, that all the items of the account were correct, nor as to the payment of any balance. The minds of the parties did not meet. Exhibit 1 cannot be considered as standing alone under the circumstances of this case. On its face it appears to be tentative; submitted for a ten days' consideration as to errors. Within the ten-day period a controversy arose. In the monetary dealings between the parties there were debit and credit items. There was controversy as to the debit items and necessarily would be as to a balance due to the receiver on a controverted account.

Error is claimed because appellant's request to withdraw his rest and submit further evidence was denied. The request was made after the court had announced it was going to sustain appellee's request for a directed verdict. Whether a party may withdraw his rest and introduce further testimony rests within the sound discretion of the trial court, and there is no indication in the record that this discretion was abused.

We think it was not error for the trial court to permit the letter of January 4, 1932, to the receiver as part of the cross-examination of the assistant to the receiver in charge of failed banks. It is not questioned that the letter is genuine; that it was received, and it is part of the controversy between the parties.

The record failing to show prejudicial error, the judgment is

AFFIRMED.

WALTER E. TAYLOR, GUARDIAN OF THE ESTATE OF JACOB HANGARTNER, APPELLEE, V. OTTO E. LUEDKE, APPELLANT.

FILED APRIL 6, 1934. NO. 28862.

Liens. Section 52-601, Comp. St. 1929, construed, and *held* not to provide for a lien upon the crops in favor of a farm hand, for labor in plowing the land, planting and tending the crops, as for labor performed on personal property.

APPEAL from the district court for Madison county: CHARLES H. STEWART, JUDGE. *Affirmed.*

Willis E. Reed, for appellant.

William L. Dowling and *Charles J. Thielen, contra.*

Heard before ROSE and PAINE, JJ., and LIGHTNER, REDICK and THOMSEN, District Judges.

REDICK, District Judge.

Action in equity to restrain enforcement of a lien claimed for work done upon personal property. The district court granted a permanent injunction and the defendant appeals.

Defendant was employed as a farm hand at $25 a month and findings by one Warden, tenant under lease from Taylor, guardian of the owner, who was an incompetent. Defendant claimed a lien for a balance of his wages due

him from Warden for work and labor performed in preparing ground for planting, planting crop, and tending the same, upon the corn and hay upon the premises. He bases his claim of lien upon section 52-601, Comp. St. 1929, which reads as follows:

"A person * * * who shall perform work or labor, or exert care or diligence or advance money or material upon personal property under a contract, express or implied, shall have a lien for his reasonable or agreed charges therefor and for the reasonable expenses and the costs of satisfying same, and shall be entitled to retain possession thereof until his claim is satisfied."

A proper construction of the above statute will determine the rights of the parties. The defendant, recognizing that the lien, if any, is based upon the continued retention of possession of the personal property upon which the lien is claimed, contends that the corn and hay were in his possession. In this he is in manifest error. It may have been in his custody, but it was in the possession of the owner. One having mere custody of an article must deliver it up to the owner on demand, but one having the rightful possession may retain it until his right expires. Such possession as defendant had was the possession of the owner.

Defendant also contends that in preparing the ground, planting the crop and tending the same, he was performing work on personal property. Here again we think he is in error. The statute presupposes the existence of personal property upon which the labor is performed. Here the personal property did not come into existence until after severance, at which time all the labor had been performed.

Regardless, however, of all the above considerations, and assuming that we are lamentably wrong in the conclusions stated, we are unable to adopt defendant's construction of the statute as granting a lien under the circumstances detailed. To do so we would be required to hold that a

chauffeur, having washed the car, might withhold possession thereof from the owner until his wages were paid. Likewise a cook who had prepared the dinner might refuse to deliver the same into the dining room to appease the appetites of her master and his guests until her weekly wage was settled. A hostler who had administered castor oil to or scattered flea powder upon the master's dog would be entitled to a lien on the dog for such services. The milkmaid would have a lien on the cow or the product; and the chambermaid for cleaning a rug or vessel *de convenance* would have a lien upon the respective article. We are not prepared to so hold.

The argument *reductio ad absurdum* is said to be the weakest form of logic, if logic at all, but we think it strong enough to wreck the defendant's case.

Finding no error in the record, judgment of the district court is

AFFIRMED.

LEE SHOWERS, APPELLEE, V. A. H. JONES COMPANY ET AL., APPELLANTS:
GLOBE INDEMNITY COMPANY ET AL., APPELLEES.

FILED APRIL 6, 1934. No. 28873.

1. **Appeal.** Where the evidence is conflicting, or when reasonable minds may differ as to the inferences to be drawn from undisputed facts, the verdict of the jury will not be disturbed if sustained by sufficient evidence.
2. **Automobiles: SPEED: PROOF.** Where the rate of speed of an automobile is the question, the time and place with reference to the scene of the accident as of which evidence is admissible rests largely in the discretion of the court, and, unless abused, its ruling will not constitute reversible error.
3. **Evidence** examined and found amply sufficient to sustain the verdict.

APPEAL from the district court for Adams county: RALPH R. HORTH, JUDGE. *Affirmed.*

Stiner & Boslaugh and *Edmund P. Nuss*, for appellants.

Miller & Blackledge and *Hamer & Tye, contra.*

Heard before ROSE and PAINE, JJ., and LIGHTNER, REDICK and THOMSEN, District Judges.

REDICK, District Judge.

Action to recover damages claimed to have been occasioned by an automobile collision between the gravel truck driven by plaintiff and a Chrysler automobile driven by the defendant Osborn, an employee of the defendant A. H. Jones Company. The collision took place at the intersection of two highways in Adams county on June 23, 1931, at about 6:15 p. m. The petition alleged that as plaintiff was driving his truck south approaching the intersection and about to enter the same he saw the defendant's car about 100 yards west of the intersection and proceeded across, and when he had reached about the south line of the east and west road the defendant carelessly and negligently ran into the side of plaintiff's truck, overturning it and causing serious injuries to plaintiff. The material charges of negligence are that the defendant's employee was driving his car at an excessive rate of speed, did not have it under proper control, failed to yield to plaintiff the right of way, and failed to see the plaintiff in the intersection.

The defendants answered separately and denied each and every allegation of the petition, and alleged that the collision was caused by the negligence of the plaintiff in several particulars, and defendant A. H. Jones Company filed a cross-petition seeking to recover damages for injury to the automobile.

Trial to a jury was held, resulting in a verdict and judgment for plaintiff, motion for new trial overruled, and defendants appeal.

This is one of a somewhat numerous class of cases presented to the court which bring to mind the remark of Hamlet to Horatio that "There are more things in heaven

and earth, Horatio, than are dreamed of in your philosophy;" by which we mean to observe that it is placing an inordinate strain upon the human understanding to require it to account in a reasonable manner for the occurrence of the accident.

The situation surrounding the two drivers, without dispute, was substantially as follows: The sky was clear and the accident happened in broad daylight. The intersection of the two highways was in the open country with no obstructions of moment to obscure the vision of either driver within 500 or 600 feet. The north and south highway was not as greatly traveled as the east and west, but consisted of a well-defined roadway about 20 feet in width. There was a gradual rise for about a quarter of a mile north of the intersection; there was a growth of wild clover on the margin of the highway about four or five feet high, but it did not form any substantial obstruction to the view of either driver.

The east and west highway was more traveled, was practically level for 30 or 40 yards west of the intersection, and then took a gradual rise to the top of the hill 180 or 200 yards from the intersection. At the top of the hill, on the north side of the road, was a farm house and outbuildings and a straw stack somewhat north and about 30 or 40 yards east of the house.

The evidence of the plaintiff is to the effect that when he was about 10 rods north of the intersection he looked to the west and saw defendant's automobile just coming down that little raise about 25 or 30 rods from the intersection, and that when he was about 20 or 25 feet from the intersection he saw defendant's car about 50 or 60 feet therefrom, and believing that he could safely cross, and when he was about 20 or 25 feet from the center of the intersection, he stepped on the gas; that he was traveling about 22 or 23 miles an hour approaching the intersection and on account of his heavy load did not increase his speed more than a mile an hour before the collision

which occurred when his rear wheels were upon the south line of the intersection; defendant's automobile striking the truck just forward of the rear right wheel.

Defendant Osborn testified that as he reached the top of the hill he looked to the north to see if the road was clear, "and seeing nothing in that road from the intersection to the brow of the hill running north from that intersection, I proceeded on without giving it much more consideration." He said he was uncertain which way to travel, whether to turn south or continue east and slackened speed with the intention of turning south, but finally concluded to go east; that as he came into the intersection he slowed down to about 20 miles an hour; that he heard the truck, looked up and saw it for the first time about 15 or 20 feet to his left; that he then turned his car to the right in an attempt to avoid the collision. Osborn testified that in his opinion plaintiff's truck was traveling at the rate of 40 miles an hour, but it is extremely doubtful whether this testimony should have been received as he was hardly in position to make a reliable estimate. In all other respects we are impressed with the fairness with which the witness gave his testimony.

The evidence is practically without dispute that the collision took place very close to the south line of the east and west road and about 12 feet west of the east line of the north and south road; the truck proceeded forward into the ditch and overturned about 60 or 70 feet south of the intersection, while the Chrysler turned on its side on the south line and about the center of the road.

In this state of the evidence we are convinced that the finding of the jury was amply warranted. If Osborn had looked to the north at any time within 100 or 150 feet of the intersection he must have seen the truck approaching, and it seems a warrantable inference that the truck reached the intersection first, and it is difficult to understand why Osborn did not see it until it was within 20 or 25 feet of him, unless, as he says, after having looked at a

point near the top of the hill he did not thereafter give it much consideration.

One of the charges of contributory negligence is that plaintiff failed to yield to Osborn the right of way at the intersection. This is based upon the proposition that Osborn was on plaintiff's right, and assumes that both cars reached the intersection at approximately the same time. However, as above suggested, an inference that plaintiff reached the intersection first is warranted from the facts testified to by him, and which the jury might believe, that when the truck was 20 or 25 feet north, the Chrysler was 50 or 60 feet west of the intersection, and the further undisputed fact that the collision took place on the south line. The jury were correctly instructed by the trial court as to the right of way, and the duty of the party having such right to yield if to exercise it would probably result in a collision. The questions who had the right of way and whether plaintiff was negligent in attempting to cross, or defendant in not yielding the right of way, if he had it, were all for the jury who seem to have resolved them in favor of plaintiff.

In a written statement made by Osborn shortly after the accident he said he was coming along at the rate of 30 or 35 miles an hour, and he testified that he did not reduce his speed to 20 miles until just as he reached the intersection. Whatever his speed, the question does not seem debatable that if he had looked when he should have done so he would have seen the plaintiff's car in time to have avoided the accident. The verdict of the jury is amply supported by the evidence and should not be disturbed.

Defendants offered the evidence of witness Schmidt, the farmer living in the house at the top of the hill, as to the rate of speed at which Osborn was driving as he passed that point, which was excluded by the learned district judge, and such ruling is assigned as error. In *Schwarting v. Ogram*, 123 Neb. 76, we held: "When the speed of

a motor vehicle is charged as negligence, it is proper to admit competent evidence of the speed at which it was being driven a few seconds before the collision," which was a correct statement of the law as applied to that case. It was said, however, in the opinion: "This question of the admissibility of the speed of a vehicle shortly prior to the time of the accident rests largely in the discretion of the court." A proper foundation was laid qualifying the witness to give his opinion and its admission would probably not have been reversible error, as was held in the *Schwarting* case, but it does not follow that its exclusion was reversible error under the circumstances of the present case. Before the ruling the witness had testified that Osborn was driving "slow" and the defendants had the benefit of that testimony; but, beyond that, Osborn had admitted in his statement that he was traveling 30 or 35 miles an hour, which finds some support in his testimony that as he neared the intersection he reduced his speed to 20 miles an hour. No offer was made of what it was expected to prove by the answer, but if we assume the witness would have fixed the rate of speed at 20, 25 or 30 miles an hour, it would not have aided defendants as Osborn had fixed it, and there was no attempt on the part of plaintiff to show the rate except by inference from the circumstances surrounding the collision. We, therefore, conclude that the exclusion of the evidence offered is not reversible error, if error at all.

Other questions are presented by the briefs, but we do not consider it necessary to discuss them. We find no error in the record and judgment of the district court is

AFFIRMED.

GEORGE BROOKS, APPELLANT, V. THAYER COUNTY, APPELLEE.

FILED APRIL 10, 1934. No. 28885.

1. **Counties.** A county cannot be held to be an insurer of those who have occasion to use a county bridge or road.
2. **Witnesses: CROSS-EXAMINATION.** In this state the strict rule of cross-examination has been approved, to the effect that a party has no right to cross-examine any witness except as to facts and circumstances connected with matters stated in his direct examination; if he wishes to examine him as to other matters, he must make the witness his own, calling him as such in the subsequent progress of the case.
3. **Appeal.** Under section 20-853, Comp. St. 1929, violation of the strict rule of cross-examination will not be considered ground for reversal unless it clearly results in prejudice to the substantial rights of the party complaining.
4. **Trial: INSTRUCTIONS.** It is the duty of the trial court to state the issues raised by the pleadings and supported by evidence.
5. ———: ———. "Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former." *Koehn v. City of Hastings*, 114 Neb. 106.
6. **Negligence: CONTRIBUTORY NEGLIGENCE: INSTRUCTIONS.** "Where plaintiff has made a *prima facie* case in an action for negligence resulting in personal injuries without disclosing any negligence on his part, the failure to instruct the jury that contributory negligence as a defense must have been the proximate contributing cause of the injuries may be prejudicially erroneous even in absence of a request for such an instruction." *McCulley v. Anderson*, 119 Neb. 105.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Barnes & Rain, for appellant.

Baldwin & Baldwin, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LANDIS, District Judge.

GOSS, C. J.

This is an action for damages for personal injuries and injuries to a truck. Plaintiff appeals from a judgment based upon a verdict against him.

The accident occurred about 8 o'clock the night of September 6, 1931, at a bridge in the public road two miles east and about three-quarters of a mile north of Bruning, in Thayer county. Plaintiff was driving a truck loaded with two cubic yards of gravel. He had just been employed to haul gravel for the purpose of surfacing a road. This was his first trip over the road.

The petition alleged that at the place in question the county had built a bridge at an abrupt angle to the road, necessitating a sharp turn to approach it from the south, and had permitted the approach to be unguarded either by posts or rails and unmarked by any warning sign indicating that the road made a sudden turn to the northeast across the bridge; that, when approaching the bridge from the south and driving at a lawful rate of speed and in a careful manner, plaintiff drove his truck into the ditch on the west side of the bridge, injuring him and his truck; that defendant's powers are exercised by a board of county commissioners having general supervision over public road and bridges with the duty to maintain them in a reasonably safe condition; that the damage was proximately caused by the insufficiency of the highway, the absence of warning signs, the lack of guard-rails or posts, and the failure to use ordinary care to maintain the highway in a reasonably safe condition.

In its answer defendant admitted the exercise of supervision over the road in question by the county board and the duty of maintenance in a reasonably safe condition, but denied that defendant permitted the approach to be unmarked and unguarded, alleged there was no occasion for guards or notice in such approach, that the bridge was in the usual and ordinary condition of bridges, was not in a dangerous condition, and in general traversed the other material allegations of the petition not admitted; for further defense the answer pleads that plaintiff was driving in a reckless and careless manner, at a dangerous and excessive rate of speed, that plaintiff's truck was not in proper mechanical condition for travel upon the public

roads, and that the injuries to plaintiff or to his truck were the result of his own negligence in operating it upon the road.

The evidence shows that the road was an ordinary, ungraveled north and south public road. A creek crossed it from the southeast to the northwest. The bridge was called a 16-foot bridge. Its roadway was actually 15 feet 9 inches wide. As approached from the south, it was built at an angle of 40 degrees and 22 minutes east of a line due north so as to cross the creek at right angles and save length. The bridge (and the approach from the south for a distance of 39 feet) ran almost northeast and southwest. 309 feet south of this 39 feet of the approach the road veers 3 degrees and 5 minutes west, so that 39 feet from the bridge, as approached from the south, there is a turn of 43 degrees and 27 minutes toward the east. There was no warning sign indicating a bridge or change of direction in the roadway. There was no wing or rail guarding the approach to the southwest corner of the bridge. This had been carried away the night before when a car driven by some young men went into the creek at this point, and had not been replaced. Plaintiff and his truck failed to keep the roadway and drove off the approach, going down the bank into the creek at the left of the bridge, injuring both.

Plaintiff assigns that the evidence is insufficient to sustain the verdict, that the verdict is contrary to law, and that the court erred in not directing a verdict for plaintiff. We think it will be of little value to analyze the conflicting evidence. We satisfy ourselves by saying that to hold with plaintiff on these points would be to declare in effect that the county is an insurer of the safety of those who travel its public roads. A county cannot be held to be an insurer of those who have occasion to use a county bridge or road. *Johnson County v. Carmen,* 71 Neb. 682; *Frickel v. Lancaster County,* 115 Neb. 506.

Under errors of law occurring at the trial, plaintiff charges that the trial court erred in permitting plaintiff's

witness, John Gerdes, on cross-examination, to give his opinion that plaintiff's truck was traveling 35 or 40 miles an hour before it reached the bridge. Gerdes had testified on direct examination that he lived north of the bridge, that he was in his yard a little less than a quarter of a mile away from the bridge and had seen the lights of a car coming from the south; that his attention was attracted to a crash, and he went down to the bridge, where he found plaintiff and took him to a doctor. The rest of his direct testimony relates to the bridge and conditions surrounding it and the accident. He was not interrogated in chief as to knowledge of the speed of the car. On cross-examination he was allowed, over objection, to testify to his opinion of the speed of the car "before it reached the bridge." This opinion did not go to the speed at which it was traveling near the bridge, because later he testified that trees in his pasture obscured the bridge so it could not be seen. As the bridge was between him and the approach to the bridge from the south, of course he could not see that either. He was evidently testifying on cross-examination to the speed a considerable distance south of the bridge, perhaps a quarter or half mile away, of a car coming almost directly toward him, basing his judgment upon the movement of the lights alone. It appears to be merely a guess. Even if the car had been going 35 or 40 miles an hour when he saw it first at a distance of a half mile, or could have continued at that speed until it disappeared from his view, it might have slackened its speed before his attention was attracted by the crash when it went off the approach. But the objections were that no foundation had been laid and that this was not proper cross-examination. His competency to testify to the speed is such that his testimony must be admissible for what it is worth, but his testimony is not clearly cross-examination. Plaintiff had testified he was going 20 to 25 miles an hour. Gerdes had not testified to the speed on his direct examination. Plaintiff argues that plaintiff had a legal

right to have his testimony as to speed refuted, if refutable, by evidence on behalf of defendant; and that, if defendant wished to use plaintiff's witness for that purpose, it should have made Gerdes its own witness.

"According to the orthodox rule, which exists in England, Canada and a number of jurisdictions in the United States, when a party produces a witness who is sworn and examined, the opposing party is not confined in his cross-examination to the matters upon which the witness is examined in chief, but may extend the cross-examination to every issue in the case." 28 R. C. L. 603, sec. 193.

"Until 1827, the orthodox rule seems to have been almost universally followed. But in a Pennsylvania case decided in that year it was said that a witness might not be cross-examined to facts which are wholly foreign to what he had already testified. Subsequently the broad rule was laid down by the United States supreme court, that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause. This rule, commonly known as the 'American rule,' has now become firmly established in the federal courts and in the courts of most jurisdictions of this country." 28 R. C. L. 604, sec. 194.

In this state the strict rule of cross-examination has been approved. *Atwood v. Marshall*, 52 Neb. 173; *Davis v. Neligh*, 7 Neb. 84; *Boggs v. Thompson*, 13 Neb. 403; *Hurlbut v. Hall*, 39 Neb. 889; *Easton v. Snyder-Trimble Co.*, 94 Neb. 18; *Owens v. Omaha & C. B. Street R. Co.*, 99 Neb. 364. But "The scope of the cross-examination of a witness rests largely in the trial court, and its ruling will be upheld, unless an abuse of discretion is shown." *Peterson v. State*, 63 Neb. 251; *Goemann v. State*, 100 Neb. 772. "Although a witness is cross-examined as to matters not brought out on the direct examination, the

judgment will not be reversed when it plainly appears that no prejudice could have resulted." 28 R. C. L. 605, sec. 195. This same result is commanded by our section on civil procedure, providing that the court must disregard any error in the proceedings, and may not reverse any judgment on account thereof, unless it affects the substantial rights of a party. Comp. St. 1929, sec. 20-853. So the question to be answered on this point is whether the admission of this testimony on cross-examination affected plaintiff's substantial rights or, in other words, was prejudicial to him.

In *Callahan v. State*, 83 Neb. 246, it was held to be prejudicial error to require defendant to answer upon cross-examination a question relating to a subject upon which he had not been examined in chief. But that is a criminal case where the rule would be more strictly followed. There seems to be a dearth of civil cases in this jurisdiction wherein such cross-examination is held to indicate reversible error. There are many cases in which a rather wide latitude allowed by the trial court has been held to be within the court's discretion.

Here it is a rather close and delicate question. It is right on the border line. It may be said that, if defendant had made Gerdes its witness, it might have brought out the same testimony from him. That Gerdes was plaintiff's witness may have given the jury an opportunity to regard his testimony as to speed of the truck as a greater impeachment of his case than if it had been offered by defendant using Gerdes as its own witness. Moreover, we are skeptical of the worth of his testimony as to the speed of plaintiff's truck, in view of his position; though he was not very specifically examined, nor cross-examined, as to the foundation of his testimony as to speed. On another trial this situation may not arise. We are loath to hold that the trial court abused its discretion in allowing the cross-examination and will not do so. On another trial the evidence will probably be such that the question will not arise. We have perhaps unnecessarily

treated the subject at such length to show a dangerous situation that may easily be avoided.

Other assignments of error refer to certain instructions given by the court on its own motion. We consider only those we find to be questionable. The first instruction, stating what the plaintiff and defendant pleaded, is complained of. In describing the allegations of negligence contained in the petition it says, in substance and very briefly, that plaintiff charges defendant was guilty of negligence in the construction and maintenance of a public highway and bridge, and that by reason thereof plaintiff drove his truck off the highway and into a ditch causing the truck to overturn. There is no mention in this instruction (1) of the abrupt angle of the approach and bridge to the general northerly course of the road, (2) of the failure to guard the approach by posts or rails, and (3) of the failure to mark the approach by any warning indicating a sudden turn of the road to the northeast across the bridge. These were material allegations of negligence which ought to have been given to aid the jury in knowing the issues so that they could check them with the evidence. These charges of negligence are nowhere else in the instructions definitely or adequately stated to the jury. Instruction No. 2, stating the burden of proof, merely says that it is upon plaintiff to prove "every material allegation of his petition." Instruction No. 3, stating the elements, merely states (on the point in question) that plaintiff must prove "that the defendant was negligent in the construction and maintenance of the highway referred to in the petition, the bridge thereon, and the approach thereto." These omitted charges of negligence were issues raised by the petition; they should have been stated to the jury. "It is elementary that it is the duty of the trial court * * * to fairly state the issues raised by the pleadings." *Larsen v. Larsen,* 115 Neb. 601. The evidence covered the points and we are of the opinion that this failure of the court to instruct thereon was prejudicial to plaintiff.

Testimony had been received showing that a car had gone off the approach the night before at the same point, that there were then no guard-rails or barricades and no warning signs on the road. By instruction No. 15 the court referred to testimony as to an accident which occurred at the same point when the bridge and highway were in the same condition, and then said: "This testimony was admitted solely for the purpose of its tending to show that the defendant had notice of conditions existing at that point, and should be considered only for that purpose." Plaintiff had offered an instruction on this point which was refused. It said this testimony was "admitted to prove the dangerous character of the place for want of guard-rails and warning signals, and knowledge thereof by the defendant." It would have been better if the court had adapted plaintiff's instruction and blended it with his own so as to show what the "conditions" were claimed to be as to guard-rails, barricades and warning signs, as well as to bring home to defendant the notice of the "conditions." This would have helped out the situation heretofore treated of as to the first instruction given by the court. If the acts of negligence relied upon had elsewhere been set forth, instruction No. 15 might have covered the situation. As they were not so set out, the jury were left to speculate as to what were the actionable "conditions" to be considered by them under this particular instruction.

Instruction No. 18 is a model instruction given by the court on comparative negligence, giving all the proper elements of such an instruction as laid down in the leading case on that subject. *Morrison v. Scotts Bluff County*, 104 Neb. 254. This case shows that the rule applies to counties. But instruction No. 17 is as follows:

"It is the law in cases of this kind that a person traveling over the highways and bridges of a county in whatever kind of vehicle he may choose to travel must exercise under the circumstances of the case such care as he should and could exercise to protect himself and his prop-

erty from injury, and that, if he fails to do so and is injured in consequence, he has no remedy against the county even though the highway may be defective."

The rule presented by this instruction ignores the comparative negligence of the parties. An instruction which misstates the law as to contributory negligence and is in conflict with the comparative negligence rule is erroneous. *Gerish v. Hinchey,* 120 Neb. 51; *Davenport v. Intermountain R. L. & P. Co.,* 108 Neb. 387. The instruction was complete in itself and tended to confuse the jury and was not cured by the true rule given them in the very next instruction on comparative negligence. "Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former." *Koehn v. City of Hastings,* 114 Neb. 106; *Toliver v. Rostin,* 120 Neb. 363.

Plaintiff claims the court erred to his prejudice in failing to instruct the jury that the contributory negligence of the plaintiff pleaded as a defense must have contributed to or caused the injury before the jury could find for defendant, even though plaintiff did not request such an instruction. "Where plaintiff has made a *prima facie* case in an action for negligence resulting in personal injuries without disclosing any negligence on his part, the failure to instruct the jury that contributory negligence as a defense must have been the proximate contributing cause of the injuries may be prejudicially erroneous even in absence of a request for such an instruction." *McCulley v. Anderson,* 119 Neb. 105. We think such an instruction should have been given.

Plaintiff complains of instruction No. 16, reciting the legal duty of one operating an automobile not to exceed a speed greater than is reasonable, having regard to the condition of the road, and in no event at a rate exceeding 45 miles an hour, stating that a violation, if any, is not negligence, but is evidence of negligence. Plaintiff says there was no evidence of any violation of law. True,

there was no evidence that plaintiff was driving in excess of 40 miles an hour, but there was evidence from which the jury might infer that his speed contributed to his failure to keep his truck on the highway. We do not find this particular instruction erroneous.

Other errors are assigned, but we do not consider them prejudicial.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

ARTHUR A. FOREMAN V. STATE OF NEBRASKA.

FILED APRIL 10, 1934. NO. 28851.

1. **Criminal Law:** INSTRUCTIONS. Erroneous instruction is no ground for reversal unless prejudicial to complaining party.
2. ———: ———. All instructions given should be considered in determining whether a particular instruction is prejudicial.
3. ———: ———. An instruction should not point out and emphasize particular testimony.
4. ———: EVIDENCE OF OTHER CRIMES. Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. Whether such other alleged crimes are too remote rests largely in the discretion of the trial court.
5. **Banks and Banking:** DEPOSIT. A deposit is completed when a person tenders in the bank to an officer thereof a deposit slip and the checks thereon listed, which such officer accepts and issues therefor a duplicate deposit slip, initialed by him.

ERROR to the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed in part, and reversed in part.*

Flansburg, Lee & Sheldahl and *Cook & Cook*, for plaintiff in error.

Paul F. Good, Attorney General, and *R. H. Beatty, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ.

GOOD, J.

Arthur A. Foreman, president of the Farmers State Bank of Overton, was convicted on counts 9, 13 and 14 of an information, each of which counts charged that, as an officer of the bank, he had made false reports as to the bank's financial condition, with intent to deceive the secretary of trade and commerce and any other person, authorized by law to examine into the affairs of the banking corporation. He brings to this court for review the record of his conviction.

For convenience, Mr. Foreman will be referred to as defendant, and the bank, of which he was president, will be referred to as the Overton bank.

Count 9 charged defendant with having wilfully and knowingly subscribed to and verified a report showing the condition of the financial affairs of said bank at the close of business on July 1, 1929, in which statement he listed as due from the South Omaha State Bank to the Overton bank $27,798.69, when, in fact, there was only due the Overton bank from the South Omaha bank the sum of $17,798.69. Defendant admits that the report to the banking department, described in count 9, was made by him and was incorrect and untrue, but asserts that at the time he signed the report he, in good faith, believed it true and correct, and therefore there was no intent to deceive.

The South Omaha State Bank was and had been for years a depository of the Overton bank, and on many occasions, when the latter bank was in need of funds to increase its reserve, defendant would send his personal note, payable to the South Omaha State Bank, and ask and receive credit in that bank for the amount, which was placed to the credit of the Overton bank, and for which defendant would take credit in his personal account in the Overton bank, thus increasing the liability of the

Overton bank but at the same time increasing its cash reserve.

Defendant claims that about June 29, 1929, he sent to the South Omaha State Bank and payable to it his personal promissory note in the sum of $10,000, and requested that bank to place the amount to the credit of the Overton bank; that at the time he signed the report he believed that such credit had been given the Overton bank; that, had this credit been granted, there would have been to the credit of the Overton bank in the South Omaha State Bank $27,798.69; that he signed the report on the 3d day of July, 1929, and not until July 5, 1929, did he learn that the South Omaha bank had declined to extend the requested credit. The evidence on behalf of the state, however, tends to prove a different state of facts. The blanks on which the call reports are made are sent out by the department of trade and commerce from the city of Lincoln, and the records in the banking department show, and an officer having in charge the sending out of these reports testified, that the blanks were not mailed from Lincoln until July 5 and could not, in the ordinary course of the mails, have reached Overton until July 6, and that the report was not verified before the notary public until the 9th day of July. There is also evidence on behalf of the state tending to some extent to prove that the 10,000-dollar note was not sent to the South Omaha bank.

In this state of the record, the question of intent is the crucial question, so far as count 9 is concerned. If defendant's version of the facts is true, there was no intent to deceive the banking department, or any one else, in making out the report. If the facts are as contended for by the state, then there was an intent to deceive.

Defendant on the witness-stand testified that he made the report without any intent to deceive and believing it to be true when made. He contends that the court did not properly instruct upon the question of intent, and complains of the instruction given by the court and re-

fusal to give an instruction requested by defendant.

Instruction No. 7 reads as follows: "Intent is an essential element in this case, and must be established by the *evidence* the same as any other material element beyond a reasonable doubt.

"You are instructed that the intent to commit the act alleged is one of the essential elements of the crime charged. The intent, however, with which an act is done is a mental process and as such is generally hidden within the mind where it is conceived and is rarely, if ever, susceptible of proof by direct evidence, but must be inferred by the words or acts of the party entertaining them, and the facts and circumstances surrounding and attendant upon the act charged to be committed." (Italics ours.)

Defendant contends that this instruction eliminated from the jury's consideration the testimony of defendant with reference to the intent with which he made the report. By another instruction the jury were informed that the law presumes defendant innocent and such presumption partakes of the nature of evidence and continues throughout the trial until defendant has been proved guilty beyond a reasonable doubt. Another instruction stated the material allegations of the offense charged. With reference to count 9 the court further instructed the jury: "Should you find *from all of the evidence* in this case that the state has established, beyond a reasonable doubt, each and every one of the foregoing propositions, it will then be your duty to convict said defendant of the crime as charged in count number nine of the information. But if you find that the state has failed to establish count number nine of the information, as above set forth, beyond a reasonable doubt, then your verdict should be for the defendant on said count." Another instruction which the court gave is as follows: "The jury are further instructed that the intent constitutes the felonious act and this intent is to be gathered from the circumstances; not from one, but from all, and the circumstances, when taken together, must be of so

conclusive nature as to establish the 'intent' beyond a reasonable doubt; and all the facts and circumstances taken together must be inconsistent with the defendant's innocence before you can find the defendant guilty as to count nine." (Italics ours.) By another instruction the court told the jury that when weighing the evidence they should take into consideration the interest or lack of interest of the witnesses, if any such appears, the reasonableness or unreasonableness of the story told by them, and all the evidence, facts and circumstances proved.

From a consideration of all these instructions and the entire charge given, we are constrained to believe that defendant was not prejudiced by the instruction complained of. Had the instruction said that the intent "may," instead of "must," be inferred, there would be no question; but, after all, it was the criminal intent to which reference was being made in the instruction, and practically all the evidence as to criminal intent was the facts and circumstances. An instruction, though technically erroneous, is not ground for reversal unless prejudicial to the complaining party, and the rule also is that the instructions should be considered as a whole to determine whether there was prejudicial error in their giving. The requested instruction was subject to criticism as pointing out and emphasizing particular testimony.

During the course of the trial evidence was offered by the state tending to prove that on three previous occasions, at about the time call reports were expected, defendant, for the purpose of deceiving the banking department as to the amount of cash reserve carried by the bank, entered upon the bank's books a deposit, as made by defendant, and a credit taken at the South Omaha State Bank for sums of money ranging from $10,000 to $30,000, and that these reports were false in that the notes, claimed by defendant to have been sent to the South Omaha State Bank, were not sent, and the book entries were only a sham to make a showing. Defendant contends that in each instance he had sent a note to the

South Omaha State Bank for the amount for which he had taken credit on the books of the Overton bank, and that the amount shown by the report was, in fact, in the account of the Overton bank in South Omaha. There was evidence of alteration of the books of the Overton bank, indicating that changes had been made to show a deposit to defendant's account, and to show a credit of the Overton bank in the South Omaha State Bank on these occasions; and there was evidence on behalf of the state which would indicate that these credits were fictitious and that the reports, showing the credits in the South Omaha bank, were false. It is true that the evidence on behalf of defendant tends to show that each of the transactions was *bona fide* and that the changes in the books of the Overton bank were made only for the purpose of having them reflect the true state of facts. Defendant contends that the admission of evidence of other alleged offenses was prejudicial. It was plainly stated by the prosecution at the time objection was made that the evidence was offered only for the purpose of proving criminal intent, and the court admitted it only for that purpose, and in the instructions to the jury directed that they could consider that evidence only for the purpose of determining with what intent the report, described in count 9, was made.

Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to show a particular criminal intent, which is necessary to constitute the crime charged. Any fact which proves or tends to prove the particular intent is competent, although it may tend to prove an independent crime. This rule, in effect, has been recognized by this court in many cases. *Clark v. State*, 79 Neb. 473; *State v. Sparks*, 79 Neb. 504; *Chamberlain v. State*, 80 Neb. 812; *Cohoe v. State*, 82 Neb. 744; *Clark v. State*, 102 Neb. 728; *St. Clair v. State*, 103 Neb. 125; *Murray v. State*, 119 Neb. 16; *Rice v. State*, 120 Neb. 641; 16 C. J. 589. Also, the question as to whether such other alleged offenses are too remote, in point of time,

rests largely in the discretion of the trial court. 16 C. J. 594.

There are other assignments of error, relating to the admission of evidence, which have been examined, but no prejudicial error in respect thereto has been found.

Counts 13 and 14 each charged false reports and each related to the same transaction. Count 13 charged that a deposit slip, showing a deposit by stockholders of the Overton bank to the credit of "stockholders' account" in that bank of $17,200, a duplicate of which was sent to the department of trade and commerce, was false and that no such deposit was made. Count 14 charged that a letter, containing the statement that this deposit had been made in the bank, was false. The deposit slip described in count 13 and the letter described in count 14 were written on the same day and as a part of the same transaction.

Without conflict the evidence shows that on the 20th of March, 1929, a bank examiner had examined the affairs of the Overton bank and found that it carried as assets bills receivable, aggregating a little more than $26,000, which the examiner deemed to be worthless. The examiner advised the officers of the bank that it would be necessary for them to at once make an assessment upon the stock of $100 per share, to restore the impaired capital of the bank, or that the bank would be closed. Thereupon, a stockholders' meeting was called and held in the bank building in the presence of the bank examiner, at which meeting an assessment of $100 per share on the stock was made. Pursuant to this assessment, defendant drew his check or checks, for $15,200, and another stockholder drew his check for $2,000. These checks were placed in the possession of defendant as president of the bank, and a deposit slip was made out, showing the deposit of three items, aggregating $17,200, to the credit of "stockholders' account" in the Overton bank.

It appears without dispute that defendant owned 202 shares of the stock in the bank, 142 shares being carried

in his own name, 10 shares in the name of the cashier, and 50 shares in the name of one Brown, and which was pledged as collateral for a loan from a bank in Kearney. Defendant's check, or checks, for $15,200 represented the assessment upon the stock, standing in his name and in the name of the cashier. It appears that the several checks were not charged on the books of the bank against the respective accounts of the drawers; nor were they credited on the books of the bank to "stockholders' account." The state contends that no deposit was, in fact, made and that therefore the reports were false. Defendant, on the other hand, contends that, when the checks, together with the deposit slip, were placed in the hands of the bank's president and a duplicate slip was issued and delivered to the bank examiner, to be transmitted to the department of trade and commerce, a deposit was then effected. The evidence further discloses that the checks in question, after the bank failed, could not be found; whether they were destroyed or abstracted from the bank is uncertain. If, in fact, a deposit was made, then the reports were not false, even though an offense may have been committed in afterwards destroying or abstracting the checks from the possession of the bank.

In *Taylor v. Dierks Lumber & Coal Co.*, 183 Ark. 937, on page 941 of the opinion, speaking of the transaction constituting a deposit, it was said: "The transaction was completed when the customer tendered the cash and checks to the bank for deposit, and the president of the bank received them without any restriction. When the president credited the customer's pass-book with the amount of the deposit, the title passed to the bank; and the items constituting the deposit were not again subject to the control of the customer."

In *Ricker v. Davis*, 160 Ia. 37, it was held: "Deposit slips of a bank and the pass-book of a depositor are admissible, in an action for overdrafts, to show that defendant had been given credit for all his deposits, although not covering all the transactions of the parties."

In *Wasson v. Lamb,* 120 Ind. 514, it was held:

"Where a deposit is made, the amount and date thereof being entered by the cashier or teller in the bank-book of the depositor, such entries, when made by the proper officer, bind the bank as admissions.

"If checks, drafts, or other evidence of debt are received in good faith as deposits, the bank crediting them as so much money, the title to the checks or drafts is immediately transferred to the bank, which becomes legally liable to the depositor as for so much money deposited."

Suppose, in the instant case, a customer of the bank had taken the identical checks, drawn by the defendant and the other stockholder, to the bank, made out a deposit slip and handed the checks and the deposit slip to the president of the bank, who then issued a duplicate deposit slip. No one would doubt that the customer had made a valid deposit and that title to the checks then passed to the bank. So, in the instant case, the checks, when delivered to the president of the bank, as such, and he made, initialed and issued a duplicate deposit slip, a deposit was thereby completed, and the title to the checks passed to the bank. In this case, it is true, the deposit was to be placed to the credit of stockholders' account, awaiting payment of the assessment by other stockholders, when the account was to be used to take out or charge off the bills receivable which the bank examiner had determined were worthless. The checks were deposited for a special purpose. It was the duty of the officers of the bank to enter a credit to stockholders' account and to charge the accounts of the respective drawers of the checks with the amount of their respective checks.

We are of the opinion that the undisputed evidence shows that a deposit was, in fact, made, and that the report that such deposit was made was not false, even though the checks may have been afterwards destroyed or stolen.

It follows that the conviction on counts 13 and 14 must

be reversed and the action as to those counts is dismissed. The judgment of the district court as to count 9 is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

ROSE, J., dissenting.

Under court instructions open to criticism, the jury in the county in which the Overton bank failed found that defendant made a false report of the financial condition of the bank with the intention of deceiving officers of the banking department. The alleged false report was that the Overton bank had credit in the Omaha bank for $27,798.69, whereas the correct amount was $17,798.69—a discrepancy of $10,000. To convict defendant the jury had to find beyond a reasonable doubt that he thus intended to deceive some one connected with the banking department. Affirmance of the conviction requires a decision that the evidence, according to rules of the criminal law, is sufficient to prove the criminal intent of defendant beyond a reasonable doubt. It is a fact that the Overton bank had in the Omaha bank credit for $17,798.69. Defendant's explanation of the discrepancy is that he sent a 10,000-dollar note to the Omaha bank and gave the Overton bank credit therefor, assuming the note would be accepted and inserting in his report the sum of the two items, or $27,798.69. A letter from the Omaha bank to defendant as president of the Overton bank stated that the 10,000-dollar note was returned unaccepted. Defendant had many times obtained credit in the manner indicated and it was reasonable for him to assume the credit would be extended in this instance, his brother-in-law being president of the Omaha bank. Defendant admitted the error, but testified it was committed without any criminal intention. There was an explanation of dates consistent with innocence. Criminal intent essential to a conviction rests on doubtful inferences which do not seem to overcome the presumption of innocence, the positive evidence of innocence, and the reasonable explanation supported by circumstances and by direct and convincing

testimony. I am not convinced that the evidence is sufficient to prove the criminal intent of defendant beyond a reasonable doubt.

JOSEPH MANGIAMELI, APPELLEE, V. ANTHONY ARIANO, APPELLANT.

FILED APRIL 10, 1934. NO. 28835.

1. **Physicians and Surgeons.** An error of judgment may be so gross as to be inconsistent with the degree of skill and care that it is the duty of every physician to use.
2. ———. The rules governing the duty and liability of physicians and surgeons in the performance of professional services are applicable to dentists.
3. **Appeal.** After verdict has been fairly rendered in malpractice case, all circumstances and reasonable inferences to be drawn from the evidence will be marshaled in support of the verdict.
4. **Damages.** The assessment of damages is peculiarly the province of the jury, and if it appears that the verdict is not excessive, or the result of caprice, passion, or prejudice, courts should be reluctant to substitute their judgment for that of the jury, and not disturb the same, except in so far as the court can say, as a matter of law, that the verdict is unjust.
5. **Appeal: REMITTITUR.** When it appears that the trial court ordered a remittitur to be filed, which cut the verdict returned by the jury by half, and no reason appears for such a very large reduction, this court will vacate that portion of the remittitur which is excessive.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed as modified.*

Kennedy, Holland & DeLacy, for appellant.

Reed, Ramacciotti & Robinson, contra.

Heard before ROSE and PAINE, JJ., and CARTER, LIGHTNER and THOMSEN, District Judges.

PAINE, J.

This is a suit for $51,993.70 for damages for alleged malpractice of defendant, a dentist, in extraction and treatment of a tooth. The jury returned a verdict for $15,000. As a condition to overruling the motion for a new trial, the district judge required the plaintiff to file a remittitur of $7,500, and thereupon entered judgment for the remaining $7,500, to which plaintiff filed a cross-appeal.

The bill of exceptions consists of 499 pages, including the testimony of some 9 doctors and medical experts, and the discussion, pro and con, of the defendant's 40 assignments of error required briefs of 549 pages.

The plaintiff in his petition alleged that he was a minor, acting by and through his mother and next friend; that the defendant was a duly licensed and practicing dentist and dental surgeon; that upon September 18, 1930, the plaintiff was suffering pain in his lower right mandible, near his first lower right molar, and, with his older sister, went to consult the defendant. That he was suffering from pain, abscess, or inflammation, and had a rapid pulse, and fever. That said defendant did not correctly diagnose the ailment, nor treat it in a proper manner. That the tooth was extracted in such a manner as to tear the gum and distort the adjoining teeth. That he failed to disinfect the wound. That the next day the right jaw began to swell up, and plaintiff made frequent visits to the defendant for treatment of the jaw, at which times for several weeks he would probe and stir up the infected area by lancing the socket. Plaintiff became exceedingly sick, and the jaw swelled to enormous size, causing extreme pain, and he could not open his mouth. That the defendant should have but failed to diagnose the ailment as osteomyelitis of the jaw, and that the treatment given was hazardous, improper, and grossly dangerous. That until October 21, 1930, the defendant continued to treat plaintiff improperly, misinformed the plaintiff, and thus by deceit prevented him from obtaining

proper treatment. The petition then sets out in detail the serious condition that he was in when he finally went to a competent physician and surgeon.

The petition has attached to it an assignment of bills, showing that the physician and surgeon's bills amounted to $1,504, the hospital and X-ray bills to $339.70, and for special nurse, $150, making total bills of $1,993.70.

The defendant in his answer admitted that he pulled plaintiff's tooth for $1; denied that he used undue force, or tore or distorted the teeth or tissues, and denied that he was guilty of any negligence whatever. The defendant insists that the plaintiff was entitled to nothing, and that the court should have directed a verdict in his favor.

The plaintiff enters a cross-appeal from the act of the trial judge in directing him to file a remittitur of $7,500.

The evidence sharply differs, and the arguments were highly controversial on all of the important points. The plaintiff was an 11-year-old boy at the time his tooth was pulled. The defendant, Dr. Ariano, was 33 years of age, graduated from Creighton dental school in 1924, took up other work in Colorado for a couple of years, but since 1926 has been practicing dentistry at 1620 South Tenth street, Omaha. His cash-book was introduced as exhibit 23, and covers his cash receipts from June, 1930, until September, 1931, and during the month of September, 1930, being the month in which the charge was laid, he had a very active business, took in several hundred dollars, and entered items on his cash-book for all except four days of that month, entering on at least one day nearly $80. He appears to have been a very busy dentist, from the record of his cash-book. In this cash-book there is an entry of September 29, "Mangiameli, Joe, $1." This item is entered out of its regular order, and changes have been made in the dates of several other items near this one, and similar changes have not been pointed out on any other page in the book. The plaintiff, on the other hand, contends that, instead of pulling this tooth on September 29, it was pulled on September 18,

and that the defendant made this entry on September 29 to show that he had the plaintiff under his care and treatment for 11 days less time before he went into the hospital. The defendant saw the boy for the first time when he was brought in by his sister in the afternoon of the day the tooth was extracted; he had pain and toothache, and pointed at a lower deciduous molar, being a baby tooth, and defendant sent the boy and his older sister home and told them to get their parents' consent. Their testimony is that he sent them home to get $1 and come back later. He testifies that, when they came back later, he used an injection of novocaine, using an Erbe needle, which he passed through a flame; that there was no swelling in the glands of the neck at the time; that they told him the boy had been kept awake with the toothache for a couple of nights; that he used an instrument, known as an elevator, to separate the gum from the tooth, and then extracted it. The next day there was a swollen area, and he told them to put on an ice-bag, and he thinks he gave the boy a sedative, and irrigated it with a salt solution, and opened a puffed-up place in the socket with a lance. That he lanced it again the second time the boy came, and that at the fourth visit of the boy the swelling had moved back towards the ear, and there was intense pain, and he called in Dr. Distefano, who divided the office with him, and was a doctor of medicine, to see it several times.

The boy was in extreme pain, and vomited in the doctor's office at the time of the extraction. The evidence discloses that he finally came into the hands of Dr. Carnazzo, who was a skilled surgeon, and had had experience in his practice with more than 200 cases of osteomyelitis, more than 25 being of the jaw. Dr. Carnazzo was called to the home between 2:00 and 2:30 on October 21. He diagnosed the condition as acute osteomyelitis and cellulitis of the neck, with an additional diagnosis of Ludwig's angina, which is a complication which follows any infection on the floor of the mouth. It is shown by redness, a tenderness, and a hard, boardlike rigidity, which

gives the patient the appearance like a bull's neck. At that time the parts were swollen to two or three times normal size, extending from the temple towards the right eye, closing that eye, and extending down into the tissues of the neck, covering all of the right side of the head. The jaws were locked, and he could not get the mouth open at all. He was taken to the St. Joseph's Hospital, an X-ray was taken, and Dr. Kelly, the X-ray expert, reported that the right mandible showed marked irregularity in bony structure, and looked like an osteomyelitis. The bone was honeycombed. Dr. Carnazzo stated that he decided that he must incise and drain the Ludwig's angina first, for the quicker it is drained the sooner the patient will get well, and that the percentage of mortality in Ludwig's angina, such as patient had, is very high, as about 90 per cent. of the patients die, while the mortality from acute osteomyelitis was only from 5 to 10 per cent. He described in detail the four operations, indicating upon the boy in front of the jury.

The plaintiff was in the hospital the first time from October 21 to November 20, and was very sick during a portion of that time; his life being despaired of at times. The first operation took one hour and 15 minutes, and consisted of an incision clear across the jaw, cutting all tissues down to the bone, and another incision from the angle of the jaw clear down and around to the posterior portion of the neck. The periosteum, or membrane covering the bone, was found to be ruptured, and, by slitting back the periosteum from the bone, cheesy material rolled out; it was all curetted and cleaned out, then tubes were inserted to get drainage. The second operation was on October 29. The tissues had all become very much swollen from increased blood supply, and it all had to be cut open as deep as the first time. November 8 was the third operation, and Dr. Carnazzo testified: "We found there was a tablespoonful of pus over the junction of the temporal-mandibular joint; parotid gland edematous; capsule distended; tissues in neighborhood necrotic." He testified

he made a right-angle incision over right temporal-mandibular joint. A fourth operation was performed, for the sinus was still draining, so the boy's jaw was opened up, and dead bone was removed. Many of the hospital charts were introduced. The entry on the chart for this last operation, which occurred on July 17, 1931, states that there was an excision of bone, and a plastic operation on the face, and exostosis over corner of mandible, and the bone looked honeycombed. The great scar on the jaw was described as a keloid. It might be an aid to clarity to define it. Keloid is a "new growth or tumor of the skin, consisting of whitish ridges, nodules, and plates of dense tissue. These growths tend to recur after removal, and are sometimes tender or painful." Dorland's Medical Dictionary (16th ed.)

At the time of the trial Dr. Carnazzo testified that the boy still insisted upon wearing a complete head bandage constantly to cover the scars and the lumpy jaw, and thereby to avoid embarrassment. At the time of the hearing in the supreme court, the boy was present in the rear of the courtroom, but Judge Rose, presiding, refused permission of appellee's counsel to bring the boy forward and exhibit him to the court.

1. The plaintiff contends that he never had the proper or orthodox diagnosis or treatment while in defendant's hands, and charges that the defendant extracted the tooth without proper diagnosis of the condition, probed in the socket as long as he could get the boy's mouth open, tried to stretch the jaws to get inside, bruising them, prescribed sedatives and alternate use of hot and cold packs, under which his condition rapidly grew worse; diagnosed the swelling in the neck and glands as mumps, advised use of hot flaxseed; had him continue to come to his office when he was very sick, and should have been hospitalized and given complete rest; that defendant never recognized any of the symptoms of the severe afflictions from which the plaintiff was suffering.

The welfare of the citizens of a state demands that a

person practicing medicine and surgery must not only possess the ordinary learning and skill which is ordinarily possessed by others of his profession in that vicinity, but he must exercise such reasonable and ordinary skill and judgment, as well as diligence, in treating the particular case entrusted to him.

While the law does not require absolute accuracy, nor the utmost degree of care and skill, and a physician is not ordinarily liable for errors in judgment, yet an error of judgment may be so gross as to be inconsistent with that degree of care and skill which it is the duty of every physician to use. *West v. Martin,* 31 Mo. 375, 80 Am. Dec. 107; *Grainger v. Still,* 187 Mo. 197, 70 L. R. A. 49; 21 R. C. L. 379, 391, secs. 26, 36; *Stohlman v. Davis,* 117 Neb. 178.

Malpractice may consist in a lack of skill or care in making the diagnosis, as well as in the treatment of the ailment. *Cook v. Moats,* 121 Neb. 769, 78 A. L. R. 694; 48 C. J. 1113.

2. In considering the rules of law applicable to alleged malpractice by dentists, "the rules governing the duty and liability of physicians and surgeons in the performance of professional services are applicable to practitioners of the kindred branches of the healing art, such as dentists." 21 R. C. L. 386, sec. 30. The general topic of malpractice by dentists is discussed in the long notes and annotation, 69 A. L. R. 1142. *Walter v. England,* 24 Pac. (2d) (Cal. App.) 930; *Nelson v. Painless Parker,* 104 Cal. App. 770.

A finding that dentist did not exercise reasonable skill in injecting local anasthetic in gum, and extracting tooth without determining cause of, or taking measure to reduce, infection, held supported; and that dentist's failure to exercise reasonable skill in determining cause of swollen condition before injecting local anasthetic, and extracting tooth, was cause of osteomyelitis of patient's jaw, held supported. *Roberts v. Parker,* 121 Cal. App. 264.

In the third circuit (C. C. A.) the court held in *Brumberger v. Burke,* 56 Fed. (2d) 54, that the circumstantial

evidence developing permissible fact inferences is sufficient to take to the jury question whether osteomyelitis of jaw was caused by dentist's negligence. "Osteomyelitis is a disease which is caused by invasion of the bone by a germ, mainly from the mouth. A tough, fibrous membrane—the periosteum—immediately under the gum covers the bone and normally prevents such invasion. If the periosteum is cut or broken down from some cause or other, as by a loose tooth or contact with dental instruments, and not properly treated, the bone is exposed to osteomyelitic germs, invasion of the bone sets in and osteomyelitis may follow."

The defendant sets out the failure to give each of 18 instructions offered by him, and refused by the court, as assignments of error. In our opinion, there was no error committed in refusing each one of these instructions.

Complaint is made of five instructions given by the court. We are inclined to the view that the instructions given were, as a whole, so favorable to the defendant that he has no ground for complaint. Upon the rulings on the admission of evidence, the plaintiff was held very strictly to the rules of evidence, and we do not find that the defendant has ground of complaint. We have examined all of the 40 assignments of error of the defendant, and find no prejudicial errors.

3. We will now consider the cross-appeal of the plaintiff. Suit was brought for $50,000, together with the cost of the medical and hospital expenses, and the jury returned a unanimous verdict for $15,000. The trial court saw fit to cut this verdict down one-half, and directed that, if the plaintiff did not file a remittitur for $7,500, the motion for new trial would be sustained. After verdict has been fairly rendered in malpractice case, all circumstances and reasonable inferences to be drawn therefrom will be marshaled in support of the verdict.

This young boy is disfigured for life, with a great bulging scar, called keloid, upon his face, and our court has held in a case of permanent disability the jury might

consider the plaintiff's age. In this case the boy for years persisted in wearing a covering to hide it, the same as many people attempt to cover a birthmark. It will always be a source of embarrassment to him, and doubtless disqualify him from holding certain positions which he might otherwise be qualified to fill.

There seems to be general agreement that osteomyelitis is a disease which may return, and it is possible to conclude from the evidence that the four operations and curettement of the jawbone may have left the jaw in a weakened condition. The Texas court upheld a verdict of $12,325 where a machinist sustained a broken jaw and injuries which disabled him from following his occupation. *St. Louis, S. F. & T. R. Co. v. Kaylor,* 284 S. W. (Tex. Civ. App.) 983.

The California court, in a case where a girl of 13 years had the flesh torn from the side of her face, sustained a jury's verdict in the sum of $15,000. *James v. Oakland Traction Co.,* 10 Cal. App. 785. The same court upheld a judgment of $15,000 in favor of a woman, 27 years of age, who received an injury to her face and neck. *Kelley v. Hodge Transportation System,* 197 Cal. 598. The New Jersey court sustained a verdict of $17,000 where a man suffered facial disfigurement. *Duryee v. Yellow Cab Co.,* 4 N. J. Misc. 338.

Our Nebraska court has upheld verdicts in the following amounts: *Glarizio v. Davis,* 110 Neb. 679, for $13,000, where a 62-year-old man lost a leg; *Wilson v. Omaha & C. B. Street R. Co.,* 99 Neb. 693, for $10,500, for a woman 38 years of age; *Olson v. Hansen,* 122 Neb. 492, for $10,000, for a man 43 years of age; *Stewart v. Wabash R. Co.,* 105 Neb. 812, for $16,500, for a man 29 years old; *Thomas v. Otis Elevator Co.,* **103 Neb. 401,** verdict upheld for $25,000.

This young lad endured pain and suffering for months while the jawbone was draining from the infection. He has a permanent disfigurement from the lumpy jaw and thick scars, and he will suffer humiliation therefrom. He

lost about two years of schooling, and, with the chance of a recurrence of the trouble, there is a possibility of additional medical expenses to those now accumulated, of around $2,000.

4. "Where the damages awarded by the jury appear to be excessive, the trial court may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, or a portion thereof, and order the verdict to stand for the residue. But since the assessment of damages is peculiarly the province of the jury, the court will be very cautious in overthrowing verdicts on this ground, and when it appears that the verdict is not clearly exorbitant, and that the case has been tried in a fair and impartial manner, a new trial will be refused. No mere difference of opinion, however decided, justifies an interference with the verdict for this cause." 20 R. C. L. 281, sec. 64.

Section 20-1929, Comp. St. 1929, provides that, when a remittitur has been made and the case appealed, the party remitting shall not be barred from maintaining that said remittitur should not have been required, either in whole or in part.

5. In *Miller v. Central Taxi Co.*, 110 Neb. 306, the trial judge directed a remittitur, and it was held that the remittitur was excessive, and a portion thereof was ordered vacated and set aside, and a judgment for the balance, as of the date of the rendition of the judgment in the district court, was directed by this court. The case of *Christoffersen v. Weir*, 110 Neb. 390, is also to the same effect.

In *Hellerich v. Central Granaries Co.*, 104 Neb. 818, the verdict of $28,900 was returned by the jury, which the trial court ordered cut $10,000, and this court said, after examining the facts, that the judgment does not appear so excessive as to require a reversal or an additional remittitur.

In *Curran v. Union Stock Yards Co.*, 111 Neb. 251, this court directed a $10,000 remittitur to be filed where the

verdict returned by the jury was for $32,000, and stated: "The damages are for the determination of the jury, and it is with the greatest reluctance the courts will, in a manner, substitute their judgment for that of the jury."

In *Finkelstein v. City of Chicago,* 168 Ill. App. 475, it is said: "It is not the province of this court to assess the amount of plaintiff's damages, but it is within our province to determine where, as here, it appears clearly from the evidence that the amount of the judgment is excessive, what if any part thereof it would be proper for us under the evidence to affirm in case the plaintiff chooses to remit the excess." See *Campbell v. Sutliff,* 193 Wis. 370, 53 A. L. R. 771.

In *Lindley v. Wabash R. Co.,* 120 Neb. 204, on rehearing, this court had before it a verdict of $24,375, and said: "Unless there is evidence to indicate that the jury acted from caprice, passion, or prejudice, a reviewing court will not disturb the verdict, unless it can say, as a matter of law, that the verdict is so excessive as to be unjust and to require a remittitur or a reversal."

The members of the court who heard this case do not believe that the verdict of the jury was as much illegal and excessive as the trial court. We see no reason for discounting it 50 per cent. We believe there is merit in the contention of the plaintiff that he was required to remit an excessive amount of the verdict the jury returned in his favor. We think that a reduction of $5,000, or one-third of the verdict, would have been ample. It is ordered that the remittitur in excess of $5,000 be vacated, and a judgment entered for the plaintiff for $10,000, as of the date of the rendition of the judgment in the district court. As herein modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

FRANK E. DAVIS, APPELLEE, V. MARY POLAK ET AL., APPELLANTS: E. H. LUIKART, RECEIVER, APPELLEE.

FILED APRIL 10, 1934. NO. 28695.

1. **Principal and Agent.** One who pays a negotiable bond secured by mortgage to the mortgagee who does not have possession of the bond has the burden of proving the authority of such mortgagee to receive payment.
2. ———. The mere facts that a mortgagee bank, upon presentation of interest coupons upon a negotiable bond, pays or credits the amount thereof upon its books to the holder, and transmits the coupons to the mortgagor, will not of themselves constitute the bank an ostensible agent of the holder to collect the principal, it not being in possession of the bond, though the instrument was made payable at the bank.
3. **Banks and Banking:** SPECIAL DEPOSIT: TRUSTS. The purchase price of lands was paid into a bank and credited to the account of the mortgagor for the purpose of paying the mortgage and completing the sale of the lands of the mortgagor. *Held*, that the fund constituted a deposit for a specific purpose, and upon the insolvency of the bank without such payment having been made, a trust resulted in favor of the mortgagor, who was entitled to a preferential claim payable from assets of the bank in the hands of the receiver, before claims of general creditors.
4. **Mortgages:** ASSIGNMENT: NOTICE. The recording of an assignment of a mortgage securing negotiable bonds or notes is not constructive notice to the mortgagor of such assignment, but only to subsequent purchasers and encumbrancers dealing with the property or the mortgage.
5. **Bonds:** PAYMENT. Ordinarily, no duty rests upon the indorsee or holder of a negotiable note or bond to notify the maker of such ownership; but the duty is upon the maker to seek out the holder of such instrument when making payment.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Affirmed in part, and reversed in part.*

Davis & Vogeltanz, for appellants.

E. S. Schiefelbein, J. H. Barry, J. F. Berggren, F. C. Radke, Barlow Nye and *G. E. Price, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and REDICK, District Judge.

REDICK, District Judge.

This action is at law upon a negotiable bond secured by a mortgage upon 80 acres of farm land in Saunders county, Nebraska. Two other cases involving the same issues were consolidated with this one and tried together to the court, plaintiffs in those cases being respectively Flora B. Gorder and Nellie Danahay against the defendants Polak, to recover upon two negotiable bonds secured by mortgages upon 120 acres of farm land in Saunders county. Defendants in each case filed answer and cross-petition alleging payment of the bonds, and asking that E. H. Luikart, secretary of the department of trade and commerce of Nebraska and receiver of the Nebraska State Savings Bank of Wahoo, be made defendant, and that the deposit referred to be declared a trust fund payable to defendants in preference to general creditors. The receiver appeared and answered alleging that the moneys claimed to constitute a trust fund were paid to the Saunders County National Bank as the agent of said defendants, not the agent of the savings bank, and denied that they constituted a trust fund. Proper replies were filed, and upon the final hearing judgment for the plaintiff against defendants Polak was rendered in each of the cases, and that the deposits in question did not constitute a trust fund, and dismissing the cross-petitions. The defendants Mary Polak and Frank J. Polak appeal.

1. For the purpose of convenience and to avoid repetition a statement of the facts in all three cases will be here made, and they are substantially as follows:

March 17, 1926, defendants Polak borrowed of the Nebraska State Savings Bank the sum of $7,200 and gave their three negotiable bonds therefor, each for the sum of $2,400 due April 1, 1931, and to secure said bonds executed a mortgage upon 80 acres of land belonging to the defendant Frank J. Polak. On the same day they borrowed $3,000, giving two bonds therefor in the sum of $1,500 each, secured by mortgage on 120 acres of land belonging to Mary Polak; also $6,800 represented by two

bonds for $3,400 each and secured by mortgage upon the land of Mary Polak. The bonds were all payable to the Nebraska State Savings Bank and the mortgages were given to that bank as mortgagee. The bonds were payable at the Nebraska State Savings Bank and had attached coupons payable April 1 of each year representing interest at the rate of 5 per cent. per annum. These bonds were indorsed in blank by the savings bank and a portion of them came into the hands of the plaintiffs, as hereinafter stated. The coupons were also so indorsed.

In the fall of 1929, the Polaks sold their land, partly to one Frank C. Meduna and partly to one Thomas K. Simanek, with settlement to be made March 1, 1930, the total sale price being $27,700. Payment of the purchase price was made by checks of Meduna and Simanek, respectively, payable to the Saunders County National Bank, on February 27, 1930. Upon receipt of the checks the national bank charged itself on its books with the amount, by crediting the savings bank therewith, and the savings bank on its books credited the account of Frank J. Polak with the same amount. Polak was not credited by the national bank on its books. These payments were made over a year before the maturity of the bonds. Thereupon the savings bank executed and delivered releases of the mortgages to the national bank and the sale was completed by delivery of deeds from the Polaks to the purchasers. The savings bank and the national bank occupied the same banking room and were managed and controlled by the same officers, F. J. Kirchman being president and W. H. Kirchman cashier of both banks, which were generally known and spoken of as the Kirchman banks. Separate books of account were kept for each bank; but, so far as the transaction of business was concerned, there was but one bank, the different items being separated or allocated by entries upon the records only.

May 1, 1926, the plaintiff, Frank E. Davis, in the usual course of business, purchased of the Bank of Colon one of the $1,500 bonds and is now the owner and holder

thereof. On May 12, 1926, Flora B. Gorder purchased of the savings bank two of the $2,400 bonds, in due course of business, and is now the owner and holder thereof. In May, 1926, Nellie Danahay purchased of the Bank of Colon one of the $3,400 bonds, in due course of business, and is now the owner and holder thereof. Each of the bonds was indorsed by the Nebraska State Savings Bank without recourse; they were delivered to the purchasers and have remained in their possession and control ever since.

Interest was paid promptly by the Polaks, collections having been made in the following manner:

The Frank E. Davis bond. This bond was purchased from the Bank of Colon (another Kirchman bank) and as each coupon became due Davis took it to the Bank of Colon and was either paid cash or given credit in his checking account in that bank. The Bank of Colon then sent the coupon to the Saunders County National Bank and was given credit for it on the books of that bank. Davis had no transaction with either of the Wahoo banks.

The Gorder bonds. These bonds were purchased from the Nebraska State Savings Bank by one O'Donnell, brother-in-law of Flora B. Gorder, who lived in the state of Wyoming, as her agent and for her benefit. The bonds were indorsed without recourse by the bank and delivered to O'Donnell, who retained possession of them until they were delivered to Minnie, sister of Flora, at her request, and the coupons, as they became due, were taken to the bank and credited to the account of Flora Gorder on the books of the Saunders County National Bank. O'Donnell testified that Flora requested him to do business with F. J. Kirchman of the Nebraska State Savings Bank, that her father had always done business there, and that she would prefer to deal with them, rather than any other of the banks here.

The Danahay bond. This bond was purchased from the Bank of Colon where Mrs. Danahay had an account, she living in Omaha, and negotiations were carried on en-

tirely by correspondence. The bond was indorsed without recourse by the savings bank and delivered by the Colon bank to Nellie Danahay, in whose possession it has remained ever since. The coupons, as they became due, were sent to the Bank of Colon, placed to the credit of Nellie Danahay, and forwarded by the bank to the Saunders County National Bank, where they were credited to the Bank of Colon. Nellie Danahay never had any transactions with either of the Wahoo banks.

The Polaks paid the interest on these bonds to the savings bank by checks upon the national bank, or in some cases the national bank advanced the interest and charged the Polak account. The purchasers of the land insisted upon the transaction for the sale of the lands being consummated at the national bank in order that the title might be cleared of the mortgages to the savings bank, and all parties were either present or represented by attorneys when the matter was closed, the savings bank having executed and delivered proper releases of the mortgages. April 15, 1930, the savings bank and national bank closed their doors and their assets were taken over by the department of trade and commerce and later defendant Luikart was appointed receiver of the savings bank.

As appears above, however, the savings bank, at the time it executed the releases, was not the owner and holder of the bonds sold to the various plaintiffs. When it received credit for the purchase price of the lands on the books of the national bank it credited the amount to Polak on its books, but, instead of paying the outstanding bonds belonging to plaintiffs, converted the money to its own use, thus leaving plaintiffs' bonds unsatisfied. It also paid the interest coupons falling due April 1, 1930, on some of the bonds, notwithstanding they had been paid in full, though before maturity, and on several occasions after the transaction had been closed met the demand of Polak for the return of his bonds with the

excuse that they were too busy and for him to call at a later date.

Upon the state of facts as above outlined, defendants claim that the Nebraska State Savings Bank was the agent of the various plaintiffs and that defendants were justified in paying or permitting payment to be made to the savings bank. They contend that it was at least the ostensible agent because of the facts that it was the mortgagee, that the bonds were payable by their terms at the bank, that the interest coupons were collected by the bank, that the plaintiffs took no assignment of the mortgage and therefore no assignment appeared of record, and that the plaintiffs gave no notice to the defendants of their ownership of the bonds in question; and they invoke the principle of law that, where one of two innocent persons must suffer loss through the fraud or dishonesty of a third person, the one who put it in the power of the third person to commit the fraud must be held responsible for the result.

Defendants, appellants, cite a number of cases to the proposition that authority to act as agent may be conferred if the party to be charged as principal affirmatively, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency; and that such agency may be implied from facts and circumstances arising in the course of relations between the holder and the alleged agent, with regard to note, justifying the inference that it was intended that the latter was empowered to collect both principal and interest, even though the supposed agent was not in possession of the note in question. The propositions so announced may be conceded as correct statements of the law, but each case to which they are sought to be applied must stand upon its own particular facts and circumstances, and we think that they may all be distinguished from the cases under consideration by reason of a difference of fact, and they will now be briefly examined.

In *Rehmeyer v. Lysinger*, 109 Neb. 805, plaintiff brought

suit to foreclose a mortgage made to one Wentz and purchased by the plaintiff who took an assignment of the note and mortgage but did not record the assignment until more than a year after the mortgagor had paid the principal of the note to Wentz. Plaintiff kept the note and mortgage in a tin box in the vault of the Wentz company and as each interest coupon became due went to the office and upon Wentz producing the box plaintiff would unlock it, Wentz would clip the coupon and return the note to plaintiff who would lock it in the box and return it to the custody of Wentz. The amount of the coupon would be credited plaintiff's account and Wentz would collect the same and return the coupon to the mortgagor. When the note became due the mortgagor arranged with Wentz to give a new mortgage, which he did, in the name of Wentz, who immediately sold it to one Ida K. Long, and credited the amount received thereupon to the plaintiff on the books of the Wentz company. Notwithstanding the fact that the mortgage had matured, plaintiff called for and received interest on the loan for a year and a half, in ignorance of the fact that it had been paid. Upon the failure of the Wentz company, in March, 1920, about fifteen months after the mortgage matured, plaintiff made application for her papers, but the same were not in her box and were later found somewhere among the company's papers. Under these circumstances this court found that Wentz was the ostensible agent of the plaintiff for the collection of the note and affirmed the judgment for the defendant. In the opinion of the writer this is a "border line" case and the judgment of the court must have been largely influenced by the act of plaintiff in collecting the interest for a considerable period after the maturity of the note, which furnished a strong inference of confidence in and reliance upon Wentz with reference to all matters connected with the note, and also of negligence on her part in attending to her business.

The plaintiffs in the instant cases were guilty of no

negligence. All their acts were in accordance with ordinary business custom. The only negligence apparent from the record was that of defendants and their agents in failing to secure the delivery of the negotiable bonds upon payment. In *Thomson v. Shelton,* 49 Neb. 644, judgment for defendant in the lower court was affirmed upon the ground that it would not be disturbed where reasonable minds might draw different inferences from the testimony. In *Home Savings Bank v. Stewart,* 78 Neb. 624, payment was made to the original payee who was in possession of the note, furnishing a presumption of ownership which was not rebutted by the fact that the note was indorsed in blank. In *Harrison Nat. Bank v. Austin,* 65 Neb. 632, the note was paid before maturity to one Burr, who was the agent of the bank in securing loans, and the evidence showed a series of transactions between the plaintiff and Burr where the latter collected the principal and interest of the loans, and the court held that such fact warranted the finding that Burr was the agent of the bank. In *Stuart & Co. v. Stonebraker,* 63 Neb. 554, the original payee of a note undertook its collection with the knowledge of the plaintiff and was therefore held his agent. In *Phoenix Ins. Co. v. Walter,* 51 Neb. 182, there were extended dealings between the Nebraska & Kansas Farm Loan Company and the plaintiff in which the company procured loans for the plaintiff and collected interest and principal thereof, and it was held that the plaintiff was estopped to deny the agency of the company to receive payment from the borrower. In *Holt v. Schneider,* 57 Neb. 523, one Burr secured loans for the plaintiff and collected the interest and principal and remitted to plaintiff at irregular times, and acted in various other matters in connection with the loans as agent for the plaintiff, and it was held that Burr was an ostensible agent. In *Pine v. Mangus,* 76 Neb. 83, where the supposed agent, in the usual course of business, collected the interest and principal of loans for the plaintiff, he was held an ostensible agent. In *Bliss v. Falke,* 125 Neb. 400, there was

direct evidence by the cashiers of the banks who held and owned the notes and mortgages in question that they expected the party charged as agent to collect the notes.

It will be noted, so far as the plaintiffs Davis and Danahay are concerned, that they had no dealings with the Nebraska State Savings Bank or the Saunders County National Bank; they sent their coupons for collection to the Bank of Colon, which paid them or credited same to account of the owners. If the purchase money in question had been paid to the Bank of Colon, the questions discussed in the above cases might have some application and there would be some room for the contention that the Bank of Colon was the agent of those plaintiffs; but, as the Bank of Colon did not receive any of the money paid by the purchasers and those plaintiffs knew no other bank in connection with the transaction, it is perfectly clear that the two Wahoo banks were the agents for collection of the Bank of Colon but not of the plaintiffs.

The situation as to the bond held by Gorder is somewhat different. That bond was purchased from the Nebraska State Savings Bank by her agent, O'Donnell. The notes and mortgage were kept in the possession of O'Donnell or the sister of plaintiff, and upon presentation of the coupons they were paid by crediting the checking account of Gorder in the books of the Saunders County National Bank, which returned them to defendants. These are substantially all the facts upon which defendants rely to establish an ostensible agency in the Nebraska State Savings Bank. We think they are clearly insufficient for that purpose. In *Kile v. Zimmerman*, 105 Neb. 576, it was said: "It is undisputed that Reed was the agent of Mrs. Kile at least for the collection of interest; but it is well settled that proof of that fact alone will not afford a sufficient basis for the inference that he was also her agent for the collection of the principal, if he did not have the note in his possession." But if the evidence is of such a character that reasonable minds might draw different inferences therefrom, under the long established

rulings of this court the judgment of the trial court will not be disturbed. The action is at law upon the bonds and the finding of fact by the trial court is to be given the same effect as a verdict of a jury. The equitable claim set up by defendants constituted no defense to the petition, and therefore did not convert the action into one in equity. As against an inference of ostensible agency in the savings bank, attention is called to the fact that it did not have, and since the purchase of the bonds by plaintiffs it has not had, possession of the bonds. Furthermore, the defendants made the national bank their agent for the purpose of seeing that the bonds and mortgage were paid and taken up, and the savings bank was the agent, rather of the national bank than of the plaintiffs.

The bonds in question were negotiable instruments, and it has been held that "payment of money on a note at a bank where it is made payable, when the note has not been left there and is not produced, is not a payment of the note. In such case the person receiving the money becomes the agent of the payor, not of the payee." *First Nat. Bank v. Chilson,* 45 Neb. 257. Where payment is made upon a note, before due, to an agent of the payee who has neither the possession of the note nor authority to collect it, it is made at the risk of the debtor. *Walsh v. Peterson,* 59 Neb. 645. Authority to collect interest coupons is insufficient upon which to ground an inference that such person has authority to collect the principal sum, where the evidences are not and have not been in his possession. *Lay v. Honey,* 2 Neb. (Unof.) 749. Nor does such authority carry with it implied agency to collect the principal of the debt before due. *Walsh v. Peterson, supra.* Section 62-605, Comp. St. 1929, of the negotiable instruments act provides: "The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it."

Considerable stress is put upon the failure of plaintiffs

to obtain assignments of the mortgage and have the same recorded; but such record would not be constructive notice to the defendants, but only to creditors, subsequent purchasers or mortgagees dealing with the property. Stress is also put upon the fact that plaintiffs did not notify defendants that they were owners of the bonds; but no duty rested upon them to do this; the duty is upon the debtor upon a negotiable instrument to seek out the creditor, and if he pays the wrong party he must suffer the loss. When the Gorder bonds were negotiated they were accompanied by an agreement signed by the Kirchmans to repurchase on six months' notice; and the Davis and Danahay bonds by a certificate signed by the Saunders County National Bank that the mortgage securing said bonds was held by said bank in trust for the benefit of the holders, and it is therefrom argued that payment to the trustee terminated the liability of the debtor, citing *Brown v. Hall*, 32 S. Dak. 225, which is an authority for plaintiffs in these cases, though on quite a different state of facts; also, *Newman v. Fidelity Savings & Loan Ass'n*, 14 Ariz. 354, holding that a mortgagee to whom the mortgagor has conveyed the legal title must be presumed to act with authority in entering a release of the mortgage upon the record. That was an action between the assignee of the note and a subsequent mortgagee and would have some application here if this action were against the purchasers Meduna and Simanek, but here there is no question of innocent purchasers involved. Holding the mortgage in trust for the bondholders imports no authority to receive payment, but merely to preserve the security.

We are clearly of the opinion that payment to the Saunders County National Bank or the Nebraska State Savings Bank did not constitute payment of the bonds of the plaintiffs, and that the finding of the trial court that the savings bank was not the ostensible agent of plaintiffs is sustained by sufficient evidence, and it will not be disturbed.

2. The cross-petitions in the three cases present a claim against the receiver of the Nebraska State Savings Bank that the purchase money for which the bank gave Polak credit, to wit, $27,700, was a deposit made for a specific purpose of taking up the bonds and mortgages of Polak to that bank, and constituted a trust fund for the repayment of which defendants are entitled to a preferential claim upon the assets of the bank. Denuded of all technicalities the situation is simply this: The savings bank received the money, credited it to the account of Polak, and executed and delivered releases of the mortgages to the national bank to be delivered to Polak, and thereupon Polak delivered his deeds to the purchasers. True, the checks of the purchasers were made to the Saunders County National Bank and were indorsed by that bank, but no credit was given Polak upon the books of that bank, and apparently the checks so indorsed were delivered to the savings bank, which thereupon placed the amount to the credit of Polak. The checks were upon other banks and collected through the First National Bank of Wahoo. How it can be contended under this state of facts that the national bank received the money and that, if it constituted a trust fund, their claim should be made against the national bank is beyond our comprehension, yet this seems to be the contention of the receiver. It may be possible that the defendants are entitled to protection of the fund as against both banks, but this question is not before us and we do not decide it. We are, however, clearly of the opinion that the evidence establishes all the conditions required to constitute a trust fund in the hands of the savings bank. The money was deposited in the savings bank to the credit of Polak; it was received for the specific purpose of taking up Polak's bonds and mortgages; it certainly augmented the assets of the savings bank while it remained therein; it was intermingled with the general funds of the bank and converted by the bank to its own use for other purposes than that for which it was deposited. A clearer case of

trust and abuse thereof has not come to our attention. If I make a deposit in a bank to be used for a specific purpose and it is not used for that purpose a trust results in my favor for the return of the money. *State v. Bank of Otoe*, 125 Neb. 414; *In re Warren's Bank*, 209 Wis. 121.

It is argued by the receiver that this is not a trust fund because the savings bank never had the money and its assets were not thereby augmented, and that the account in the savings bank was an account of the national bank. These propositions are in the face of undisputed evidence to the contrary. The savings bank credited the money to Polak. It was not drawn out by the national bank, but upon receipts purporting to be signed by Polak but without his knowledge. True, the money was paid to the national bank, but this was the very conversion of which Polak complains. The credit to Polak on the books of the savings bank was the same, in banking custom, as the deposit of the actual money, and was so treated by the bank. It is also argued that the money was all gone before the bank closed. This, however, does not defeat the claim of a trust, because a claimant is entitled to charge the general mass of the bank's assets coming into the hands of the receiver, which amounted to at least $150,000. *State v. Farmers State Bank*, 121 Neb. 532.

In *State v. State Bank*, 122 Neb. 582, we held: "Converted proceeds of a check delivered to and received by a bank for the sole purpose of paying a specific debt of the payee *held* trust funds payable in full from bank assets in the hands of the receiver." To the same effect see *State v. Farmers State Bank*, 121 Neb. 547. We think the principles announced in those cases are controlling in this and that the defendants are entitled to have their claim against the Nebraska State Savings Bank allowed a preference over the claims of general creditors to the extent of the amount due Frank E. Davis for the princi-

pal of his bond and any unpaid interest thereon up to the date of such allowance.

It is probable that, upon the same principles herein announced, the plaintiff Davis is also entitled, as beneficiary of the trust, to a preferential claim against the savings bank, but this leads to no confusion or danger of double payment, as the matter will be subject to adjustment by the receiver upon the final settlement of the insolvent estate.

It follows that the judgment of the district court in favor of the plaintiff and against the defendants for the amount of the bond sued upon is right and is affirmed. That part of the decree denying defendants a preferential claim is reversed, with instructions to the district court to enter a decree allowing such claim in accordance with this opinion.

AFFIRMED IN PART, AND REVERSED IN PART.

PAINE, J., dissenting.

I dissent from the foregoing opinion. I desire to set out some of the facts upon which I base this dissent.

The pleadings and the evidence disclose that Frank J. Polak was a customer of the Saunders County National Bank at Wahoo, Nebraska, and carried a checking account in said bank. The Nebraska State Savings Bank was also operated in the same room, and F. J. Kirchman was president of each bank, and the directors were the same with one exception. The two banks were considered as one bank by the general public, being often referred to as the Kirchman bank. On April 15, 1930, both banks became insolvent, and were closed by the respective authorities, the Saunders County National Bank being taken over by the comptroller of currency and the Nebraska State Savings Bank being taken over by the department of trade and commerce.

As stated in the main opinion, Mr. Polak contracted to sell the land upon which these three mortgages were outstanding, in the fall of 1929, to Frank C. Meduna and

Thomas K. Simanek. The settlement was to be made March 1, 1930, at which time these said purchasers, to protect themselves against the mortgages, shown in the abstracts to be held by the Nebraska State Savings Bank, insisted upon making settlement at the bank.

The check from Frank C. Meduna is exhibit 18, dated February 26, 1930, payable to the Saunders County National Bank, in the sum of $9,500, and has written in the corner thereof, "For account F. J. Polak on condition Mtges. released as shown by abstract." The several checks from Simanek were drawn on several different banks, and made a total of $18,200.

While the checks were made payable for a total of $27,700 to the Saunders County National Bank, they were credited at once on the books of that bank to the account of the Nebraska State Savings Bank, mortgagee, in that bank, and at the same time were entered in the books of the Nebraska State Savings Bank to an account designated "Polak, Frank J. 1930," of which account defendant Polak had no knowledge, and withdrawals made from this account by Kirchman were without his knowledge.

In a settlement sheet, exhibit 22, dated March 1, 1930, F. J. Kirchman, as president of the Saunders County National Bank, certifies that the amount due on the $17,000 Polak loans that day was $20,403.55, and that all of the loans have been fully paid, leaving a net deposit to the credit of Mr. Polak of $7,296.45. Thereupon, warranty deeds were delivered by Mr. Polak and wife, and a release, being exhibit 10, was made by the Nebraska State Savings Bank, by F. J. Kirchman, president, and W. H. Kirchman, cashier, under date of February 26, 1930, releasing the mortgages made by the Polaks to that bank, in the total sum of $17,000. After receiving the statement of the president of the bank, Mr. Polak testifies that he demanded the return of the notes, but the officers of the bank put him off, saying they were too busy to look them up, and that he went in every few days, but was put off each time. On April 15, 1930, when

the Nebraska State Savings Bank was taken over by the department of trade and commerce, the balance due it from the Saunders County National Bank on that day was $82.85. The record further shows that exhibit 25 was a receipt, dated March 8, 1930, signed by Frank J. Polak, showing receipt from the Nebraska State Savings Bank of the balance on the land sale of $7,296.45, and a deposit slip of the Saunders County National Bank of the same date, showing the amount placed in his checking account in that bank.

The foregoing facts set out transactions which were still usual in 1930, of finding a cash buyer for an encumbered farm, paying off the mortgage from the purchase price and having a surplus left for the owner of the farm. The parties involved in this transaction had implicit confidence in F. J. Kirchman, and the fraudulent and dishonest manner in which the transaction was handled did not come to light until after the Kirchman banks had closed. It then developed that some of these coupon bonds had been sold long before, and were not taken up with the purchase money paid to Kirchman for that purpose.

About May 1, 1926, Frank E. Davis, plaintiff herein, had purchased one of the $1,500 bonds, Flora B. Gorder had purchased two of the $2,400 bonds on May 12, 1926, and Nellie Danahay was the owner of one of the $3,400 bonds. Each of these purchasers knew the mortgage securing the bonds was upon the Polak land, but had never notified the Polaks they had purchased the bonds or recorded any assignment of the mortgage, and knowledge of the fact was never brought to the Polaks in any way.

While F. J. Kirchman had given a certificate on March 1, 1930, that all of these loans had been paid off, and had released the mortgages securing them, yet he never called in these bonds for payment, and the three parties named above brought action upon the bonds against the Polaks.

The case of *Rehmeyer v. Lysinger*, 109 Neb. 805, holding directly contrary to the main opinion, is reviewed, and dismissed with the statement that it is a "border line" case. It cannot be disposed of so easily, in my opinion, for the facts were not as strong as this case, and yet the finding of this court was directly contrary to the holding in the main opinion. Let us consider it. The plaintiff sought to avoid the consequences of the fraudulent acts of a faithless agent, as in the case at bar. Petition was for foreclosure of real estate mortgage. Defendant's answer gives a brief history of the transaction; alleges defendant's entire lack of knowledge or notice, actual or constructive, that plaintiff was assignee of the mortgage; alleges defendant's payment in full of said note and mortgage, and the estoppel of plaintiff against defendant to the relief she seeks.

It appears that Mrs. Rehmeyer, who was 80 years of age, purchased the note, but did not record her assignment until 15 months after the mortgagor had paid it off to Wentz. It was held that Charles W. Wentz was the agent of the plaintiff in collecting the mortgage, and her lack of ordinary diligence and her agent's perfidy are alone responsible, the court saying: "Where one of two innocent persons must suffer through the misfeasance of the agent of one, that one must suffer who has placed the agent in a position to perpetrate the fraud complained of."

The Polaks were entirely innocent of the felonious acts of the president of the mortgagee bank concerning their notes, but O'Donnell, who handled the Gorder bonds, knew all the facts, placed his agent, Kirchman, in a position to defraud the Polaks.

Let us examine another "border line" case established by this court. In *Taylor v. Flodman*, 109 Neb. 812, a companion case to the *Rehmeyer* case, the purchaser did not file her assignment of the mortgage until over two months after Wentz failed. So far as the evidence shows, not a soul knew of the transaction except the plaintiff and Wentz, and no one could know anything about it

except as one or the other of these two individuals imparted the information. The plaintiff uttered not a word concerning it, nor did Wentz. Exactly the same as O'Donnell did in the case at bar. Did this court consider only the position of the plaintiff? No. The statement is made: "She kept her assignment from the public records, and thereby its very existence from the knowledge of defendant and the world. In the meantime that she made Wentz her agent to collect her interest and look after the mortgage matter for her stands admitted in the record. Under these circumstances, in the name of common sense and reason, why should plaintiff expect the mortgagor or any subsequent grantee to deal with any one but Wentz in the payment of the mortgage debt. * * * True, it is a hardship that the plaintiff should suffer this loss. It is also true that it would be a hardship that defendant should suffer a like loss." These words of the late Judge Troup, with the substitution of Kirchman in the place of Wentz, make the case on "all fours" with the case at bar. Should we not give weight to a "border line" case when it is clearly on this side of the border?

There is still another decision of this court that in some respects is more closely in point than these two "border line" cases. It is *Bliss v. Falke,* 125 Neb. 400. Falke gave a mortgage on a half section of land to the identical Nebraska State Savings Bank to which the Polaks gave their mortgages. The same F. J. Kirchman sold an undivided half of this loan to each of two of his country banks. Now, let us take the words of the decision: "About the time they became due, January 1, 1930, they notified Kirchman, who had been the go-between of the parties in the said renewal and also in the collection of interest and in the preparation of papers and who was also a stockholder of both of the banks, that they desired payment. Kirchman notified Falke and suggested that he get the money from the defendant Otto, giving him a mortgage on the land to secure the same, and pay off the

banks. He did so and placed the money in Kirchman's hands for that purpose. The record shows, I think, that he borrowed the whole or major portion of it from the Nebraska State Savings Bank of Wahoo. This he did, believing that Kirchman was duly authorized to collect and receive. Kirchman did not account to the bank but reloaned and used the money for other purposes."

Upon the failure of the mortgagee banks, the receiver took the position that plaintiffs do in the case at bar, and insisted that Kirchman was not an authorized agent for the collection of these mortgages, and started foreclosures. Judge Shepherd states in this opinion that the fact that Kirchman did not have the mortgages in his possession when he collected the money is not sufficient to prove that he was unauthorized to receive it, and to bind the bank by so doing. The trial court found that Kirchman was the agent for collection, and entered decree adjudging that the mortgages had been fully paid, canceled said mortgages, and dismissed the case, and the judgment is affirmed by Judge Shepherd. He says:

"Certainly, if Kirchman had not been made an agent to collect and was unauthorized to receive the money, the receiver was not bound by what he did and may foreclose and sell the land to discharge the two mortgage debts. On the other hand, the fact that Kirchman did not have the mortgages in his possession when he collected the money is not sufficient to prove that he was unauthorized to receive it and to bind the bank by so doing. Lack of possession, to be sure, is a circumstance to be considered and Falke took some risk in paying without requiring a release or an authorization in writing showing Kirchman's agency. *Thomson v. Shelton*, 49 Neb. 644. * * *

"The fact that the banks never received their money, the fact that Kirchman never accounted for the money paid, the fact that the rights of innocent depositors are involved, is not material if Kirchman was authorized to collect and receive. Kirchman may have been guilty of breach of trust, but that cannot be chargeable to Falke

or to Otto if they were not parties to it; and there is no evidence of the latter."

As the syllabus states the law in Nebraska, let us consider the two paragraphs therein which, up to the time of the release of the main opinion in this case, has been the law in our state, as announced by Judge Shepherd in *Bliss v. Falke, supra:*

"Ostensible authority to act as agent may be conferred if alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon apparent agency.

"That party collecting mortgage was not in possession thereof could be considered, but was not conclusive on question of authority to act as mortgagee's agent." (250 N. W. 250.)

The first syllabus paragraph is taken from the case of *Thomson v. Shelton,* 49 Neb. 644, and is cited with approval in *Pine v. Mangus,* 76 Neb. 83, in which case the syllabus stated the law of Nebraska in 1906, and in my opinion, with a slight change, could well be used for the syllabus in the case at bar. It reads:

"A mortgagee of real estate assigned its mortgage, and guaranteed the payment thereof, and thereafter collected the principal and interest, but failed to account therefor to its assignee, who instituted this action to foreclose the mortgage. Evidence examined and *held* sufficient to show that the mortgagee was the agent of its assignee, and the payments to it satisfied the mortgage indebtedness."

Other cases are *Stuart & Co. v. Stonebraker,* 63 Neb. 554, and *Newman v. Fidelity Savings & Loan Ass'n,* 14 Ariz. 354, which hold that a mortgagee is presumed to be the legal owner and holder of a mortgage and the evidence of the debt secured thereby, and in the absence of actual or constructive notice to the contrary, the mortgagee holding a recorded deed from the mortgagor must be presumed to act with authority in entering a release of such mortgage upon the record. Many other citations will be found in the excellent article in 7 Neb. Law Bul-

letin, 307, where we also find: "The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority which he has."

In "Restatement of the Law of Agency," by the American Law Institute, just published, section 82 reads: "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him."

It is certain that not one of the plaintiffs ever failed to affirm the agency of Kirchman in collecting their interest from Polaks during all those years and delivering the coupons to Polaks for them.

Were the plaintiffs not negligent in permitting the Kirchman bank at all times to show apparent agency in handling all business relating to these loans? Not a single act can be cited on the part of plaintiffs to show their ownership. On the other hand, the evidence shows that the Polaks were absolutely unaware of any change in the ownership of their notes and mortgages, and had no reason to suspect a change. They paid the bonds in full to the same mortgagee from whom they had borrowed the money, and paid all interest, and he gave them releases thereof.

"Whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Broom's Legal Maxims (9th ed.) 463.

In my opinion, the holdings in the case at bar disturb a long line of decisions of our court, and force the defendants, who have done no wrong, to pay large sums of money a second time for the benefit of plaintiffs, who have, by their want of ordinary care, conferred ostensible and apparent authority upon Kirchman to act as their agent in the collection in full of the principal and interest of the notes they are now suing for.

FLORA B. GORDER, APPELLEE, V. FRANK J. POLAK ET AL., APPELLANTS: E. H. LUIKART, RECEIVER, APPELLEE.

FILED APRIL 10, 1934. No. 28696.

Affirmed in part and reversed in part upon the authority of *Davis v. Polak, ante*, p. 640.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Affirmed in part, and reversed in part.*

Davis & Vogeltanz, for appellants.

E. S. Schiefelbein, J. H. Barry, J. F. Berggren, F. C. Radke, Barlow Nye and *G. E. Price, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is an action on two promissory notes by the holder thereof, Flora B. Gorder, plaintiff, against the makers thereof, Frank J. and Mary Polak, this being the second case in a series of three cases involving somewhat similar facts and governed by the same rules of law. In the first of these cases, *Davis v. Polak, ante*, p. 640, will be found a general statement of the pleadings and evidence, as well as the evidence with reference to the two notes involved herein. However, there is no evidence warranting a judgment against Mary Polak as the bonds were not executed with reference to nor upon the faith and credit of her separate estate.

This case is ruled by the principles announced in the opinion in *Davis v. Polak, ante*, p. 640, and no further discussion will be made, and for the reasons therein announced the judgment of the district court is affirmed as to defendant Frank J. Polak, on the bonds sued upon, but reversed and dismissed as to Mary Polak; that part of the decree denying defendants a preferential claim is reversed, with instructions to the district court to enter

a decree allowing such claim in accordance with this opinion.

AFFIRMED IN PART, AND REVERSED IN PART.

Paine, J., dissents for reasons stated in his dissent to *Davis v. Polak.*

NELLIE DANAHAY, APPELLEE, V. MARY POLAK ET AL., APPELLANTS: E. H. LUIKART, RECEIVER, APPELLEE.

FILED APRIL 10, 1934. NO. 28697.

Affirmed in part and reversed in part upon the authority of *Davis v. Polak, ante,* p. 640.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Affirmed in part, and reversed in part.*

Davis & Vogeltanz, for appellants.

E. S. Schiefelbein, J. H. Barry, J. F. Berggren, F. C. Radke, Barlow Nye and *G. E. Price, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is an action on a bond by the holder thereof, Nellie Danahay, plaintiff, against the makers thereof, Frank J. and Mary Polak, this being the third case in a series of three cases involving somewhat similar facts and governed by the same rules of law. In the first of these cases, *Davis v. Polak, ante,* p. 640, will be found a general statement of the pleadings and evidence, as well as the evidence with reference to the bond involved herein.

This case is ruled by the principles announced in the opinion in *Davis v. Polak, ante,* p. 640, and no further discussion will be made, and for the reasons therein announced the judgment of the district court is affirmed as to the bond sued upon; that part of the decree denying

defendants a preferential claim is reversed, with instructions to the district court to enter a decree allowing such claim in accordance with this opinion.

AFFIRMED IN PART, AND REVERSED IN PART.

PAINE, J., dissents for reasons stated in his dissent to *Davis v. Polak.*

CATHERINE A. MURPHY, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT ET AL., APPELLEES.

FILED APRIL 10, 1934. No. 28864.

1. **Statutes:** CONSTITUTIONALITY. Chapter 110, Laws 1921, relating to utilities districts *held* constitutional.
2. ———. By reference in chapter 110, Laws 1921, relating to the levy and assessment of special taxes to pay the cost of water mains, to the provisions of statutes governing metropolitan cities to provide the method to be followed in making such levy and assessment, such provisions were thereby adopted and became incorporated into said chapter as a part of it.
3. **Municipal Corporations:** IMPROVEMENTS: ASSESSMENTS. The entire cost of an improvement may be levied upon the property specially benefited, if not in excess of such benefits, and may be levied according to foot frontage where the benefits are equal and uniform.
4. ———: ———: ———: COLLATERAL ATTACK. The finding of the board of directors of a metropolitan utilities district, sitting as a board of equalization of special assessments, is in the nature of a judgment of a court, and, provided the board had jurisdiction, errors therein can only be reviewed in a direct proceeding in error to the district court, and are not subject to collateral attack.
5. ———: EXTENSION OF WATER MAINS. Grant of power to a metropolitan utilities district to extend water mains beyond the limits of the city has the effect to enlarge the boundaries of such district to include the territory to be served by such extension.
6. ———: WATER MAIN DISTRICTS: CREATION: NOTICE. Legislative enactment that publication of notice in the principal city comprising or within the boundaries of a metropolitan utilities district, of notice of formation of a water main district, and sitting of board of equalization of special taxes, to owners of

real estate within said district, whether within the city limits or not, meets all the requirements of due process of law.

7. ———: IMPROVEMENTS: ASSESSMENTS. A finding by a board of equalization, levying special assessments, that the lands are specially benefited to the full amount of the assessment is tantamount to a finding that such benefits are equal and uniform, warranting the adoption of the foot front rule.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

S. L. Winters, for appellant.

Dana B. Van Dusen, contra.

Heard before ROSE and PAINE, JJ., and LIGHTNER, REDICK and THOMSEN, District Judges.

REDICK, District Judge.

This is an action brought by appellant to cancel and enjoin the collection of a special assessment levied against her real estate by the Metropolitan Utilities District of Omaha for the construction of a water main in the street adjoining same. The middle of the street is the boundary of the city limits of Omaha, and the main was laid within the city limits. Plaintiff's property consists of a 40-acre tract on the west side of Forty-second street, in which the main was laid, and has never been subdivided into lots, but the property to the east and west is platted, the lots on the east being serviced with water and gas mains and that on the west to a small extent. It will not be necessary to set forth the pleadings of the respective parties, but their contentions will appear later on. Hearing in the district court resulted in a decree for the defendant, and plaintiff appeals.

The defendant Metropolitan Utilities District is a corporation maintaining a system of water works and gas works in the city of Omaha, and is invested by the legislature with certain powers appropriate to its functions, among others to build water mains and levy special assessments upon property benefited to pay the cost thereof,

and it was in the exercise of these powers that the assessment attacked was levied.

Chapter 110, Laws 1921, was an act authorizing cities and metropolitan utilities districts to create water main districts and levy special taxes to pay the costs of water mains constructed therein. The sections of said act so far as material to the questions presented for our determination are as follows:

Section 1 granted authority to metropolitan utilities districts to create a water main district and to make extensions or enlargements of water mains.

Section 2 provided that the power should be exercised by resolution of the board of directors.

Section 3 provided for the publication of the notice in the official paper of the city within the metropolitan utilities district, addressed generally to the owners of real estate within the district, notifying them of the creation of the water main district, and notifying them that they have 30 days after such publication to file protest against the creation of said district.

Section 4 provided for the construction if no protest.

Section 5 is as follows: "That upon the completion of an extension or enlargement of any water or gas main, or other utility service, in any such district, the actual cost thereof shall be duly certified to the council or directors of such city or village or metropolitan water, or utilities district, and thereupon it shall be the duty of such council or directors to assess such cost, not exceeding the cost of installing a six-inch water main or a four-inch gas main, or of other utility service, as the case may be, upon all real estate in said district, in proportion to the frontage of said real estate upon said main or utility service. The cost of any such extension or enlargement in excess of the estimated cost of installing a cast iron six-inch water main * * * heretofore authorized to be assessed and levied against the real estate in said district, shall be paid out of the 'water fund' * * * of such city, or village, or metropolitan water district, or metropolitan utilities district, if there be such fund, and

if such city or village has no 'water fund,' * * * then the same shall be paid out of the general fund." Provision is then made for levying a special tax in ten instalments, and the section then proceeds: "Prior to the levy of said special tax as herein provided, the same shall be equalized in the same manner as provided by law for the equalization of special assessments levied in such cities, villages, and the metropolitan city within such metropolitan water district, or utilities district, respectively." It then provides that the entire cost of laying said water main may be assessed upon the property of the district with the consent of the owners thereof.

Section 7 provides that the city or utilities district may by resolution elect to proceed under the provisions of the act.

Section 8 is as follows: "That any metropolitan water, or utilities district is hereby given power to extend water mains, gas mains, and other utility service under its operation and management beyond the corporate limits of the city so as to include adjacent territory, precincts, towns, or villages, even though the same be in an adjoining county or counties, and may create such water main, gas main, and other utility service districts within such adjacent precincts, cities, towns, and villages, even though the same be located in an adjoining county or counties." The section then directs what proceedings shall be taken where the district extends into an adjoining county.

On September 18, 1929, the committee on services and extensions of the board of directors of the utilities district recommended the creation of water main district No. 1304 in accordance with resolution therewith submitted. To this report was attached a plat showing the boundaries of the proposed district to include certain lots in Orchard Place on the east side of Forty-second street and within the city limits, and the east 132 feet of plaintiff's tract adjoining such limits, the district extending on Forty-second street from P street on the south to Orchard Avenue on the north.

The directors of the district then passed a resolution creating said water main district No. 1304, to comprise that part of Forty-second street between Orchard Avenue and P street, "and shall include therein the following described real estate, to wit:" Then follows a description of the east 132 feet of plaintiff's land. The resolution then provided for laying an 8-inch water main, and the publication of notice in the official paper of the city of Omaha of the creation of said district, and the ordering of said water main, and notifying the owners that they would have 30 days after the publication of the notice to file written protest. Said resolution further contains the election of the district to proceed under the provisions of the act of the legislature above quoted. Notice was duly published and December 4, 1929, a resolution was passed reciting that no protest had been received, and the engineering department had estimated the cost at $1,460, and directing that said water main be constructed by day labor. The validity of these proceedings is not attacked except upon grounds urged against the assessment which will be hereinafter discussed.

October 22, 1929, resolution was passed by the board of directors providing for the assessment and equalization of the taxes upon the real estate in said district to pay the cost of said water main extension which was fixed at $1,245.34. The resolution contained the following: "Be it further resolved, that the board of directors finds that the amount to be assessed and levied upon the real estate within said water main district per front foot to pay the cost of said water main extension is and determined to be, upon the several pieces of real estate in the said water main district in the city of Omaha and county of Douglas, as follows, to wit:" Then follows a description of the east 132 feet of plaintiff's land, assessed in two parcels, one for $241.61 and the other for $410.27.

It was further resolved that the board of directors sit as a board of equalization on November 5, 1930, for at least one day from 10 a. m. until 5 p. m. "For the

purpose of considering and equalizing the proposed levy of special taxes and assessments as shown by the preceding resolutions, and for the purpose of correcting any errors therein, and for the hearing of all complaints that the owners of propery so to be assessed and taxed may make against said special assessments so proposed to be levied to cover the cost of the extension of said water main in said water main district." It further provided for the publication of notice in the official paper of the city of Omaha, of the time and place of the sitting of the board of equalization, which notice was duly published, stating the amount of the total proposed assessment upon each of the parcels of real estate within the district, including that of the plaintiff.

The board of equalization met on November 5, 1930, and remained in session from 10 a. m. until 5 p. m., when it took a recess until November 12, 1930, at 3:45 o'clock p. m., at which time report was made to the board of directors by the chairman of the board of equalization, as follows:

"Your board of equalization reports that no complaints were made to the proposed assessments for special benefits in the following water main districts and gas main districts in the city of Omaha and in the county of Douglas, and your board of equalization finds that the proposed assessments of special taxes are in all things correct and that the real estate therein described has been specially benefited to the amount of the proposed assessments against the said respective pieces of real estate as set down in the records of your proceedings on pages 10 to 32 inclusive of your minute book under date of October 22, 1930, to wit: Water main districts Nos. 1304 * * * all in the city of Omaha and in the county of Douglas, state of Nebraska."

Thereupon the board of directors of the Metropolitan Utilities District passed the following resolution:

"Whereas, it having been and is adjudged, determined and established that the several lots and pieces of real

estate hereinafter referred to have been each specially benefited by the extension of a water main in water main district No. 1304 in the city of Omaha and county of Douglas, to the full amount herein and hereby levied and assessed against each of said lots and pieces of real estate, respectively, therefore, for the purpose of paying the cost of the extension of water main in water main district No. 1304 it is hereby ordered by the board of directors of the Metropolitan Utilities District under and by virtue of the power vested in it in that behalf, that that part of the total cost of said extension of water main in water main district No. 1304 in the sum of $1,213.76 be and the same is hereby levied and assessed, according to special benefits by reason of said water main extension, upon the following lots and pieces of real estate in the city of Omaha and county of Douglas, respectively, to wit:"

Then follows description of the east 132 feet of plaintiff's land and the amounts assessed thereon. The resolution then proceeds with a recital that the special taxes had been equalized and the real estate described found to be specially benefited to the amount of the proposed assessment, and provides for their payment in ten instalments, etc.

The copies of these proceedings received in evidence do not purport to include descriptions of any other lots or tracts than those of the plaintiff, the omission thereof being indicated by asterisks; but the plat hereinbefore referred to purports to describe all of the property assessed. It also bears the following notation: "Actual cost of 8" 1359.22; actual cost of 6" 1245.34; total assessment 1213.76; rate per front foot .78958914; total frontage 1577.2." The proceedings are in substantial conformity with the law governing special assessments in metropolitan cities.

The plaintiff did not appear before the board of equalization nor take any proceedings in error from their conclusions, as she might have done (*McCague Investment Co. v. Metropolitan Water District*, 101 Neb. 820), but founds

her case upon the proposition that the special assessments resulting from the proceedings are void. The case therefore presents a collateral attack upon them. The numerous attacks upon the validity of the proceedings are not separately stated nor paragraphed in appellant's brief, so we will take up and consider them, as nearly as may be, in the order in which they are argued.

1. That the Metropolitan Utilities District of Omaha is not a legally organized corporation. This is not seriously urged and will not be further considered.

2. That the boundaries of the water main district are not described with sufficient certainty. This point is not counted upon in plaintiff's petition, and therefore need not be examined to any extent. If we understand counsel's argument, it is based upon the fact that the various resolutions, copies of which were received in evidence, included only the description of plaintiff's lands. We think the point not well taken, especially as the plat upon which those proceedings were based and to which they referred contains a definite description of the real estate included within the district and its boundaries.

3. That there is nothing in the record to show the cost of laying a 6-inch main. In this we think counsel is in error. The plat hereinbefore referred to was stipulated as correct, and admitted in evidence without objection. It contained the notation above mentioned that the actual cost of a 6-inch main was $1,245.34; the actual cost of an 8-inch main (which was laid) was stated as $1,359.22; while December 24 thereafter, the estimated cost of the main was fixed at $1,460. While the evidence is not very satisfactory, we think it warrants a finding that the cost of a 6-inch main is sufficiently shown and, the assessment being for a less amount, the statute was not infringed. In this connection the further point is made that there is no provision in the statute for payment of the excess cost of a 6-inch main beyond special benefits, but we think plaintiff is not entitled to raise this question and we do not decide it.

4. That the assessment is made according to the foot front rule and there is no finding in the record that the special benefits are equal and uniform and is therefore void. Plaintiff cites three cases from this state on this proposition, *Morse v. City of Omaha,* 67 Neb. 426, *John v. Connell,* 64 Neb. 233, and *Hurd v. Sanitary Sewer District,* 109 Neb. 384, which hold that such finding is necessary. However, in the *Morse* case it was held that the finding that the benefits are equal and uniform need not be in the exact language of the statute and a finding that each parcel of land is specially benefited to an amount equal to the tax assessed against it is sufficient. In the *John* case it was distinctly held: "It must affirmatively appear from the record that the council, sitting as a board of equalization, found that the benefits were equal and uniform;" but this was in effect overruled on the third hearing of that case (71 Neb. 10) holding that "A finding by the board of equalization that all real estate on which special assessments are levied, 'are specially benefited and shall be assessed for the full cost of construction of such sewers according to the feet frontage,' is not so fatally defective as to the requirements of a finding of uniformity as to invalidate the special assessment and render it subject to collateral attack." And it was stated in the opinion at page 15: "The finding that the property is specially benefited and should be assessed for the full cost of construction according to feet frontage, is tantamount to a statement that the benefits are equal and uniform."

In the *Hurd* case the opinion was written by the present writer, and while the point is not mentioned in the syllabus, in view of the fact that a new assessment would follow the one under attack, it was suggested: "While it appears that the city attempted to make assessments according to benefits, there was no finding by the board that the several lots were benefited to the extent of the assessment. This is necessary. *Morse v. City of Omaha,* 67 Neb. 426. And if the foot frontage rule is adopted

there should be a finding that the benefits are equal and uniform." We are not disposed to recede from this statement of the law, but it will be noted that in that case there was no finding either that the benefits equalled the assessment or that they were equal and uniform. Furthermore, it was held in *Morse v. City of Omaha, supra*, that, though there is no finding that the special benefits are equal and uniform, "a taxpayer with notice, dissatisfied with the rule per foot frontage adopted, should cause such action to be reviewed, and on failure so to do he will not, in a proceeding to enjoin the collection of such tax, be heard to say that the tax is void." In view of our holdings in the above cases, we think the findings in the present case are sufficient on this point, and it will not be necessary to discuss cases cited from other states.

5. That the statute is unconstitutional because it authorizes levy of the full cost of the improvement according to the foot front rule without regard to special benefits. This, if true, would be fatal to the law and the assessment; but it will be remembered, as above quoted, that section 5 of the act provides that prior to the levy of said special tax the same shall be equalized in the manner as provided by law for the equalization of special assessments levied in the metropolitan city within such utilities district. The entire act must be considered, and section 5 is just as applicable to section 8 as if their positions in the act were reversed. By this provision those portions of the act governing metropolitan cities are incorporated by reference into the act under discussion. *Nunes v. Wellisch,* 75 Ky. 363; *In re City of New York,* 95 App. Div. 552; *Clay v. Pennoyer Creek Improvement Co.,* 34 Mich. 204; *Sheridan County v. Hand,* 114 Neb. 813. It will therefore be necessary to examine the provisions so incorporated which are found in sections 14-536 and 14-538, Comp. St. 1929:

"14-536. All special assessments to cover the cost of any public improvements herein authorized shall be levied and assessed on all lots, parts of lots, lands and real estate

specially benefited by such improvement, or within the district created for the purpose of making such improvement, to the extent of the benefits to such lots, parts of lots, lands and real estate by reason of such improvements, such benefits to be determined by the council sitting as a board of equalization. Where they shall find such benefits to be equal and uniform, such assessment may be according to the foot frontage, and may be prorated and scaled back from the line of such improvements according to such rules as the board of equalization shall consider fair and equitable."

"14-538. In all cases, where special assessments are authorized by this act, except as otherwise provided, before any special tax or assessment be levied, it shall be the duty of the council to sit as a board of equalization for no less than one day commencing on the first Wednesday of each month. Such sessions shall be held between the hours of ten o'clock a. m. and five o'clock p. m. in the city council chamber, for one or more consecutive days. It shall be the duty of the city clerk to publish a notice of such sitting for at least three days, the first publication to be at least seven days prior to the first session of the board." Incorporating the provisions for equalization into the act in question, it seems clear that the legislature did not authorize the levy of the special assessment beyond the special benefits to the property charged. The last section above quoted would seem to dispose of the further contention of plaintiff that no provision was made for the equalization of the assessments and no notice provided of the sitting of the board, but we discuss them briefly.

6. The contention of the plaintiff on these two points seems to be based upon the proposition that the jurisdiction of the board of equalization is confined to property within the city limits, whereas the property of plaintiff lies adjoining, but outside. We cannot give our assent to this proposition for the following reasons: When the legislature authorized the utilities district to extend their

mains beyond the city limits into adjacent territory, the legal effect was to enlarge the utilities district to cover the real estate served by such extension, and the statutes treat the several cities, villages and districts as separate and distinct entities. When they refer to utilities districts they must have intended such districts, not only as then existing, but as extended by the permissive provisions of the act, and made applicable to such extended districts, as such, the provisions of the charter or statute governing the principal city within the metropolitan utilities district regarding the equalization of special assessments in that district. These provisions restricted the power of levying special assessments to the special benefits accruing to the property subjected thereto, and the power of the utilities district is likewise restricted.

But it is contended that the notice of the sitting of the board of equalization published in the official city paper is not a sufficient notice to property owners outside of the city to meet the requirements of due process of law. What we have said as to the legal effect of the statutes authorizing the extension of water mains beyond the city limits would seem a sufficient answer to this proposition. If the utilities district is composed of the real estate within the enlarged limits, it would seem to be sufficient to provide for publication of the notice in any paper published within such limits. It was within the province of the legislature to determine that publication in a newspaper of the principal city located within the district would be the most reasonable means of affording notice to property owners within the utilities district.

7. It is further contended that no power is granted to levy a special tax for the extension of water mains unless such extension is into another county. We cannot agree. Section 8 above quoted authorizes the extension of the utilities district beyond the corporate limits of the city so as to include "adjacent territory, precincts, towns, or villages, even though the same be in an adjoining county or counties, and may create such water main, gas main,

and other utility service districts within such adjacent precincts, cities, towns, and villages, even though the same be located in an adjoining county or counties." Counsel's argument seems to be that, because of the omission of the word "territory" before the word "precincts" in the latter part of the above quotation, the district is given no power to create water main districts in adjacent territory unless the same be in some county other than that in which the utilities district is located. We think, however, that the reasonable construction of the language, considering the omission of the word "territory," is that authority was given the utilities district to erect separate water main districts in precincts, etc., but that, where the real estate to be served by the extension was merely in adjacent territory, the same could be included in a district also containing property within the city, which is the case here.

8. It is further insisted that because plaintiff's lands are not subdivided and are farm lands they are not subject to special assessment to pay the cost of a water main. As has been heretofore stated, the land on the east and west of plaintiff's property is all platted and, with the exception of ten acres intervening, on the north there is a cemetery of about thirty acres extent; furthermore, the plaintiff's land adjoins the city limits on the west, and it seems fairly inferable from its location that it is susceptible of other uses than farm land, dependent upon the wishes of the owner. The mere fact that it is presently used as a farm does not render it exempt from assessment. The evidence does not show that the land cannot receive any special benefits from the improvement, as in *Hanscom v. City of Omaha*, 11 Neb. 37, and the finding of the board is at least *prima facie* correct; but we think this question is one which should have been submitted to the board of equalization, and it is not now open to the plaintiff to raise it.

Finding valid the special assessments in question, the judgment of district court is AFFIRMED.

EARL WATSON MCCLURE, APPELLEE, V. WORLD INSURANCE COMPANY, APPELLANT.

FILED APRIL 13, 1934. No. 28880.

1. Insurance: APPLICATION: BODILY INFIRMITY. A bodily infirmity, sufficient to void an insurance policy by its omission from the application, must be an infirmity sufficient to produce some real defect, amounting to an inroad on physical health or impairing bodily or mental powers.
2. ———: ———: ———. If, some five years before applying for an accident policy, an insured had suffered gasoline burns to his ankles, which, in naturally healing without the grafting of any skin, left small scars which did not affect his use of his limbs or feet, or affect his normal span of life, or his physical health, such scars were not material to the risk, and did not constitute an infirmity, which insured must disclose in his application for insurance.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Brome & Thomas and *G. H. Seig*, for appellant.

Brown, Fitch & West, contra.

Heard before ROSE and PAINE, JJ., and LIGHTNER and THOMSEN, District Judges.

PAINE, J.

This is an action upon an accident insurance policy, procured by mail, wherein the plaintiff seeks to recover seven monthly instalments of $100 each, for the loss of his left foot by accident. At the close of all the evidence, the trial court, upon his own motion, instructed the jury to return a verdict for the plaintiff in the amount claimed.

The appellant insurance company admits the issuance of a special income guarantee policy in the sum of $5,000, for an annual premium of $15, which provided for the payment of one-half the principal sum for the loss of one foot by an automobile accident, said sum of $2,500 to be payable in monthly instalments of $100 each, and alleges that, by reason of fraud and misrepresentation,

the plaintiff is not entitled to any payment, but that said defendant company is willing to repay to the plaintiff the premium paid by him for the policy.

The defendant insurance company is located in Omaha, and secures its business largely by sending out printed postal cards and sample policies to prospects. The plaintiff filled out such a card on March 13, 1930, which was received by the defendant April 21, 1930, and set out on such card that he was born May 28, 1887; age, 43; height, 5 feet 5 inches; weight, 150 pounds; race, white; that Georgia M. McClure, his wife, was beneficiary; that his address was Dawson Springs, Kentucky; and then followed this paragraph: "My habits are correct and temperate. I am in good health and free from any infirmity. My income exceeds my combined disability insurance, including benefits hereby applied for. I have not been postponed, canceled or rejected, or requested to pay an abnormal rate for insurance except by (followed by one and a half blank lines in which Dr. McClure had written 'Declined by Metropolitan, 1930, March')." When this post card application was received by the company, two policies were sent him, with a bill, one being an accident policy and one a health policy. These policies remained upon his office table until June 25, 1930, when he wrote them a letter, which, omitting the formal parts, reads as follows:

"The policy sent me a few months ago was destroyed by mistake and thrown into waste basket, the fragments afterwards partially recovered.

"I filled out this application early in the year and subsequently decided not to mail it. Instead I made application to the Metropolitan for a health and accident policy for $75 weekly indemnity and was rejected. This seemed unjust and unfair to me. I was informed thru the agent that the Business Mens Credit Ass. has given me a poor rating—a probable cause. There is an account or two pending which I prefer to settle thru the courts. However my local credit is good and I can refer you to the

First National or Commercial Bank of this city for verification.

"This application card must have been mailed to you subsequently by my office girl. I had no intention of mailing it.

"In perusing the fragments it looks as if you are offering a considerable amount of protection for so small a fee.

"I have no desire to again be refused or rejected. It will be necessary for me to make application again, and if you care to investigate this matter I will file application if I have reasonable assurance of obtaining a contract."

The defendant company wrote the plaintiff a letter on July 7, 1930, which, omitting the formal parts, reads as follows:

"This will acknowledge receipt of your kind letter of June 25 regarding the policy we sent for your inspection and approval.

"Our records appertaining to the previous policy issued to you have been marked canceled, but we have completed a new policy of the same identical form and have also issued you a health policy providing $100 monthly benefits.

"From the way we look at it, you ought to be financially able to carry these policies if you want to, and we are very little concerned in your local credit rating. Evidently you are making a living and you need insurance, and unless your income is insured in excess of its actual worth, we are not further interested in your personal affairs."

The insurance company contends that they rely entirely upon the statements made in such post card applications, and thus avoid the expense of a medical examination, and if false statements are made in the post card application the policy is void, and contend they are not liable for the accident in question because plaintiff's statements upon the post card, "I am in good health and free from any infirmity," and that he had not been rejected by any company except the Metropolitan, are false.

The defendant company bases its claim that he had an infirmity which he concealed from them upon the following facts, shown by the evidence: While Dr. McClure, the plaintiff, was practicing his profession in Cleveland, Ohio, upon December 20, 1925, he was standing in a garage where a mechanic was using a can of gasoline to wash off grease, and by an accident the can of gasoline was spilled over the plaintiff's clothes, and instantly ignited from a cigar which he held in his hand, and instantly he was in flames. Before he could get his burning clothes off, his ankles were burned severely. He remained in a hospital less than two weeks, but was treated for these burns for eight or nine months. The denuded area finally healed over with natural skin, without grafting, but left scars on his ankles. Defendant claims that this scar tissue constituted an infirmity, material to the risk, in that it made the muscles of his feet weaker. This in spite of the fact that the plaintiff said it did not affect him in any way; that he could dance, and indulge in hunting and outdoor sports. They also charge that he concealed the fact from them that he had been paid $2,000 by the National Casualty Company for such burns, and that they canceled his accident insurance; that he also concealed that he had been rejected by the Standard Accident Insurance Company.

Taking up these objections in the inverse order, the evidence discloses that he applied to the Standard Accident Insurance Company for a policy through an agent, and signed up an application in blank, and the agent later filled in the answers in the absence of plaintiff; that, upon receipt of the policy, plaintiff noticed that two answers had been omitted, one being that the agent had not shown plaintiff's rejection by the Metropolitan. The policy was returned, and this omission had been corrected in the second policy received. Plaintiff testifies he then wrote the company direct, returning the policies, and telling them of additional corrections to make in the application. The company never replied to this letter. He was not

notified that they refused to insure him or had rejected him.

In regard to the National Casualty Company, carrying an accident policy on plaintiff at the time he was burned, they paid his entire claim, as made, of $2,000, and he surrendered his policy in the settlement. The mere statement of the facts clearly shows that it was not a rejection of an application for insurance in any way, but that a claim was paid in full and the policy taken up.

We now come to a discussion of the most serious question presented to us: Did the plaintiff make a false and fraudulent statement which voids the policy when he signed exhibit No. 8, the post card application, dated March 13, 1930, which had printed in it a line in small type, reading, "I am in good health and free from any infirmity?" We note that the exhibit had across it the words, "Not taken Jul. 3—1930," as the first policy written was canceled.

The new Oxford Dictionary gives, as one definition of infirmity: "Physical weakness, debility, frailty, feebleness of body, resulting from some constitutional defect, disease, or (now mostly) old age;" and another definition is: "Weakness or want of strength; lack of power to do something; inability."

The word "infirmity" is also defined in the first syllabus in *Black v. Travelers Ins. Co.*, 121 Fed. 732, 61 L. R. A. 500, as: "A bodily infirmity is something that materially impairs the bodily powers, and to constitute a breach of a warranty against the existence of it there must be something that amounts to an actual inroad on the physical health or condition."

Now, the insurance company claims that these scars, constituting a concealed infirmity, contributed to this plaintiff's injury. What are the facts?

Plaintiff testified that he had lived at Dawson Springs, Kentucky, since March, 1928; had practiced general medicine and surgery for 12 years. That on March 7, 1931, the date of the accident, he was attending to his usual

practice; that his family was out at a card party. His brother had been visiting him from Omaha for two weeks. Then he testifies generally, condensing his statements as follows: When we came home from the card party I had one or two calls to make. I started out about 11:30. My brother was with me. He is 34 years old. I started to see a sick lady residing about five miles in the country. It was raining very hard. I was driving a Chevrolet. After taking care of the patient we started back to town. My brother drove on the way back. It was still raining very hard. The roads were filled with water, and disagreeable. The road was hard in the center, soft on the edges. There was a curved road, lined with willows, and a fill about 30 feet high leading to a bridge. Visibility was very poor. I could see nothing on my side. My brother could see, because the windshield wiper was going on his side. I felt that we were in soft dirt and were going over the bank, so I started to make a jump. I got my feet out of the door. I do not know what happened, but we turned over, and I presume the door shut on my feet. I was stunned or unconscious. I reached down and I got a spurt of blood on my hand, and realized that an artery had been broken. I grabbed hold of it to keep from bleeding to death, which would have occurred in ten minutes. It was very dark. I called to my brother. I told him to get a strip of a rubber tube in the car and help me tie it around my leg. The car was upset, everything stirred around, and it took him some time to find the tube. I was out on the ground at the bottom of the 30-foot embankment. I then knew I had both legs broken and was bleeding badly from both legs. He helped put the tourniquet on, and we tied it as tight as we could, and I then sent him home, about a mile and a half, after he had carried me up on this embankment. It was very dark, and about a quarter to one. My brother went and got my wife and brought her out in a car. I was sitting there in the rain, with both legs broken, and in severe pain. One car went by. I

tried to flag it, but they would not stop. My wife and brother came back with a car, and, stopping at home, called a doctor, who gave me first aid, and then I was taken right on to the hospital at Hopkinsville. Both of my legs were broken; that is, the two bones between the ankle and the knee, the tibia and fibula, were both broken in the right leg, and one in the left leg. It was 47 miles to Hopkinsville. We arrived there about 3 or 4 o'clock in the morning. I was about unconscious, and was delirious most of the way down from the loss of blood. I remained in the hospital about six weeks. On March 30 they amputated my left leg, and I am now wearing an artificial foot and limb. The leg was taken off at the lower one-third. It is a 9½ inch stump below the knee. My wife notified the defendant insurance company of the accident. On March 19, 1931, they mailed blanks for proof of loss.

Defendant relies upon the case of *Morrissey v. Travelers Protective Ass'n*, 122 Neb. 329. In that case the question was asked, "Is your eyesight impaired?" A member of the association was seeking his application, and such member knew that he had a cataract on his left eye, and he told the member seeking the application, and asked what the answer should be, and the agent member of the association said, "Since you can see all right, the answer should be 'No.'" About a month after the issuance of the policy, the plaintiff met with an accident when, in getting out of an automobile at Tecumseh late in the evening, he hit the back of the seat with the lens over his right eye, part of the broken lens injuring the eye, and requiring its removal. In that case, the fact concealed and misrepresented was the main contributing cause to the accident. In this case a small spot of scar tissue on the ankle was not, and could not be, a contributing cause to getting his legs caught in the door when the car was falling over an embankment, and having them broken off, and the two cases are not parallel.

The defendant company, in refusing payment of the

claim, stated two grounds in their letter of June 5, 1931, for not paying: First, that he had surrendered a policy after the company had paid large amounts for his burns; and, next, that he was suffering an infirmity as a result of said burns. They cannot, after litigation has begun, "mend their hold" and now rely upon his rejection by other companies. *Yates v. New England Mutual Life Ins. Co.*, 117 Neb. 265; *Continental Ins. Co. v. Waugh*, 60 Neb. 348.

In the case of *Mutual Life Ins. Co. v. Dodge*, 11 Fed. (2d) 486, a wife sought to collect a double indemnity of $10,000 attached to a life insurance policy, which provided that the accident insurance was not payable if death resulted from bodily infirmity. The death was caused by paralysis of the respiratory center, caused by the administration of novocaine preliminary to an operation for the removal of tonsils. Medical experts testified that the deceased had an idiosyncrasy, or hypersusceptibility, to novocaine, and the insurance company contended that this exceedingly rare condition was a bodily infirmity, but the court refused to accept this contention.

4 Couch, Cyclopedia of Insurance Law, sec. 885f, says: "The test ordinarily is as to whether or not a particular injury was serious, and such as tended permanently to impair the applicant's health or adversely affect his normal span of life, it being quite generally held that injuries which do not so result are not material to the risk. * * * So, a gunshot wound in the back of the head which does not affect insured's general health, which is uniformly good, does not falsify a warranty by him that he had never had any bodily or mental infirmity." See, also, *Black v. Travelers Ins. Co., supra; Grangers' Life Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446; *Transylvania Casualty Ins. Co. v. Paritz*, 184 Ky. 807.

In *Royal Neighbors of America v. Wallace*, 73 Neb. 409, this court held that an incorrect or untrue answer in an application for insurance, in reference to matters of opinion or judgment, will not avoid the policy, if made in

good faith, and without intention to deceive, and, in our opinion, the burden is upon an insurer to show, by clear, cogent, and convincing proof, that insured's representations in his application were false. *Equitable Life Assurance Society v. Dunn,* 61 Fed. (2d) 450.

In our opinion, the statement relating to an infirmity was not a false representation which defeated a recovery. In fact, the evidence is convincing that insured was without infirmity, and that the scar tissue at his ankles gave him no trouble and did not affect his manner of life, nor did it contribute in any way to the fracture of his legs, or the amputation necessitated by the fracture.

There being no prejudicial error in the record, the judgment of the trial court is affirmed, and an attorney's fee of $200 allowed in this court.

AFFIRMED.

FARMERS & MERCHANTS BANK OF AXTELL, APPELLANT, V. CLYDE MERRYMAN, APPELLEE.

FILED APRIL 13, 1934. No. 28759.

1. **Limitation of Actions.** A domestic judgment is a specialty and a suit thereon is barred by the statute of limitations after five years from the date of judgment.
2. ———. The plaintiff in this case brought suit on July 2, 1932, on a domestic judgment obtained on September 18, 1908, and to toll the statute of limitations pleaded that, after the cause of action against defendant accrued, the defendant departed from the state of Nebraska, at an exact date unknown to plaintiff, but during the time between March 2, 1908, and October 1, 1908, and said defendant has been a nonresident of the state of Nebraska at all times since his said departure from the state and has been continuously absent from this state since said time. *Held,* as against a general demurrer, to be a sufficient pleading of the tolling of the statute as provided by section 20-214, Comp. St. 1929.
3. ———. In a suit on a domestic judgment that appears on the face of the petition to be barred by the statute of limitations, but which contains allegations tolling the statute because of

absence of defendant from the state, it is not necessary for plaintiff to set out the foreign residence of the defendant together with facts showing that the action is not barred by the law of that state.

4. ———. Where the statute of limitations on a domestic judgment has been tolled because of the absence of the defendant from the state, it can have no application where his residence in another state has been of such a character as to entitle him to the benefit of the statute of limitations of the state to which he removed. The plaintiff, however, to state a cause of action on the judgment, need not allege facts showing that the action is not barred by the laws of the state to which he removed, it being a matter of defense.

APPEAL from the district court for Kearney county: EDWIN P. CLEMENTS, JUDGE. *Reversed.*

J. L. McPheely and *Charles A. Chappell*, for appellant.

Miller & Blackledge, contra.

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

CARTER, District Judge.

The Farmers & Merchants Bank of Axtell filed its petition in the district court for Kearney county on July 2, 1932, alleging that on September 18, 1908, the bank obtained a judgment against the defendant, Merryman, in the sum of $1,603.55, and costs taxed at $125.25. The petition further states that on November 5, 1908, August 10, 1912, and March 23, 1915, executions were issued on said judgment, all of which were returned unsatisfied. It is also alleged in said petition that, "after the cause of action against defendant accrued, the said Clyde Merryman, defendant herein, departed from the state of Nebraska, at an exact date unknown to plaintiff, but during the time between March 2, 1908, and October 1, 1908, and said defendant has been a nonresident of the state of Nebraska at all times since his said departure from this state and has been continuously absent from this state since said time." Defendant filed a general demurrer to the petition which was sustained by the trial court. Plain-

tiff refused to plead further and from a judgment of dismissal brings this appeal.

There can be no question that the executions issued prevented the judgment from becoming dormant until March 24, 1920, five years after the date of the last execution. Comp. St. 1929, sec. 20-1515. Plaintiff having failed to revive the judgment prior to March 24, 1930, ten years after the judgment became dormant, its right to have the judgment revived was forever barred by section 20-1420, Comp. St. 1929. It is clear, therefore, that under our statutes the right to revive this judgment was lost.

The question then arises whether the statute of limitations has operated against a suit on the judgment. Section 20-205, Comp. St. 1929, provides under an article entitled "Time of Commencing Civil Actions," as follows: "Within five years, an action upon a specialty, or any agreement, contract or promise in writing, or foreign judgment." The judgment sued on is a domestic judgment and this court has held a domestic judgment to be a specialty within the meaning of our statute. *Armstrong v. Patterson,* 97 Neb. 229. Clearly, therefore, the suit on the judgment was barred five years after September 18, 1908, unless the statute of limitations was tolled. "A domestic judgment is a specialty within the meaning of section 7567, Rev. St. 1913, and an action thereon is barred by the statute of limitations after five years from the date of the judgment." *Fisher v. Woodard,* 103 Neb. 253.

The only question remaining is whether the petition sufficiently pleads a tolling of the statute as against the general demurrer filed thereto. Section 20-214, Comp. St. 1929, provides: "If, when a cause of action accrues against a person, he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed; and if, after the cause of action accrues, he

depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

This court has held: "It is clearly the law of Nebraska that where it appears upon the face of the petition that the cause of action is barred by the statute of limitations, and there are no allegations tolling the statute, a general demurrer can be properly interposed to such cause of action." *Reed v. Occidental Bldg. & Loan Ass'n,* 122 Neb. 817. If, therefore, the pleading of the tolling of the statute is sufficient, the demurrer should have been overruled; if not, it was properly sustained. We are of the opinion that the allegations of the petition with reference to the tolling of the statute were sufficient as against a general demurrer. The plaintiff plainly alleges that defendant left the state some time between March 2, 1908, and October 1, 1908, and has been continuously absent since said time. Any date of departure between the two set out would bring the defendant within the statute. It is sufficiently definite and positive as to the time, and, if proved, would toll section 20-205, Comp. St. 1929.

Defendant contends that plaintiff should be required to plead the place of defendant's foreign residence and the law of that state showing that the suit was not barred by the statute of limitations of that jurisdiction. To this we cannot agree. It is true that our court has held in the case of *Webster v. Davies,* 44 Neb. 301: "Where similar statutes are in force there was formerly much doubt because of the apparent conflict between section 20 and the other sections quoted; but it has been quite generally decided that the provision of section 20 which tolls the statute during the absence of a defendant from the state does not apply where his absence has been of such a character as to entitle him to the benefit of the statute of limitations of another state to which he has removed." Yet, we are of the opinion that proper pleading demands that the operation of the statute of limitations of another

state is a matter of defense. It was so indicated in the case of *Hower v. Aultman, Miller & Co.*, 27 Neb. 251, which states: "If the statute of limitations had run against the claim in the state of Kansas where plaintiff in error resides, and the cause of action was barred by the laws of that state as alleged in the answer, this was a defense to the action, and the answer could not be assailed by demurrer as not presenting a defense."

We are therefore obliged to hold that the petition pleaded facts sufficient to toll section 20-205, Comp. St. 1929, and that the trial court erred in sustaining the demurrer to the petition.

Plaintiff contends that section 20-215, Comp. St. 1929, was changed by the commissioners who revised the Nebraska statutes in 1913 without authority and to his detriment. We have carefully compared this section as it appears in the session laws of 1905, with section 20-215, Comp. St. 1929, and find that no change or revision was made that was prejudicial to the plaintiff in this action.

For the reasons herein set out, the order of the trial court sustaining defendant's demurrer and dismissing the action is reversed and the cause remanded.

REVERSED.

CORA BRANHAM, APPELLANT, V. SUSIE K. AYERS, APPELLEE.

FILED APRIL 13, 1934. No. 28855.

1. **Wills: LEGACY: ASSIGNMENT: FRAUD.** Where the evidence shows that plaintiff was induced to assign her interest under a will because of the false representations of defendant's attorney as to her interest in the estate, which representations easily and naturally mislead, deceive and defraud, the assignment will be set aside in a proper action.
2. **Limitation of Actions: ACTION FOR FRAUD.** An action for relief on the ground of fraud must be commenced within four years after the discovery of the facts constituting the fraud, or of

facts sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery. *Parker v. Kuhn*, 21 Neb. 413, followed.

3. ———: ———: QUESTION OF FACT. Whether a litigant is possessed of such facts as would put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to the discovery of the fraud, is a question of fact to be determined from all the evidence and circumstances of each case.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Field, Ricketts & Ricketts and *Sullivan & Wilson*, for appellant.

G. E. Hager and *W. B. Price, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and Carter and Chappell, District Judges.

CARTER, District Judge.

This suit was commenced by plaintiff to recover from the defendant as executrix of the estate of George Ayers, deceased, one-half of the personal property of said estate.

The evidence shows that George Ayers died on February 7, 1927, leaving a will that contained the following provision: "I give, devise and bequeath to my wife and sisters my personal property." The evidence further shows that the said George Ayers left surviving him his wife, two minor children, three brothers, and one sister, the plaintiff herein. It also appears from the evidence that, soon after the death of George Ayers, the defendant employed an attorney to represent her who, at the direction of defendant, prepared an assignment and transfer of plaintiff's interest in said estate to the defendant, Susie K. Ayers, the wife of George Ayers, deceased; that defendant's attorney, intending to defraud plaintiff, failed to notify plaintiff of her interest in said estate, the nature and extent thereof, or that deceased had executed a will or that plaintiff was a legatee therein. It further appears that said attorney represented to plaintiff that said as-

signment and transfer were merely for the purpose of administering said estate with greater facility and at less cost; and in order to induce her, without inquiry, to execute said assignment, he represented that the brothers and relatives of plaintiff had executed a like instrument and that none of said parties had any interest in said estate; that defendant's attorney also represented that, in any event, under the laws of Nebraska all the property would descend to and vest in defendant and her children, and thereby, in effect, represented and led plaintiff to believe that she had no interest in said estate. Plaintiff alleges that she believed said false statements and, relying thereon, signed the assignment and transfer and delivered it to defendant's attorney. She further alleges that she did not learn of said false representations and fraud until March 10, 1928, which is within four years from the date of the filing of this suit. The defendant alleges in her answer that the assignment and transfer is valid and also pleads the statute of limitations. From a decree finding for the defendant, the plaintiff brings this appeal.

The letter upon which plaintiff relied in executing and delivering the assignment and transfer is as follows:

"You have no doubt been notified of the death of your brother George, who died in this city February 6.

"George in the bigness of his heart had insurance written for all his relatives including yourself. I am very glad that he did so.

"He left some personal property which is presented by his interest in the store (and of course he left his home) which will be for his wife, but in order to adjust matters without expense so that Mrs. Ayers can have the use and benefit of the personal property, his brothers have all signed an exact duplicate of the 'Assignment and Transfer' I hand you hoping that you also will sign and acknowledge it before some notary public. This will be of great help to Mrs. Ayers and the children and will also leave the store proposition so that no complications can arise.

"I hope you will execute this at once and return to me. I will be glad to remit whatever expense you are to; I hand you self-addressed stamped envelope for an immediate return that I may know just what to do, if it becomes necessary I will be obliged to go into the administration of the estate differently from what will be needed in case this assignment and transfer is executed.

"I have also sent one to Verne Luce and I expect that he will sign it. This is not necessary only for the purpose of overcoming any possible claim that might be made to the estate by any of the parties, for under the law of this state Mrs. Ayers and these children can and will hold the property. Thanking you in advance for an immediate attention, I am, truly yours."

That this letter deceived and misled the plaintiff as to the facts and induced her to sign away her rights without knowledge of the facts cannot be questioned. Plaintiff lived at Junction City, Oregon, and had no other facts before her except the letter in question. We hold, therefore, that the letter was fraudulent as to this plaintiff and will be so treated herein, and, unless the statute of limitations is a bar, the assignment could be set aside.

The only question left for determination is whether plaintiff's claim is barred by the statute of limitations. Section 20-207, Comp. St. 1929, provides in part: "Within four years, * * * an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." Plaintiff signed the assignment and transfer on March 5, 1927, and this suit was commenced on September 8, 1931. Plaintiff, however, pleads that she did not discover the fraud until March 10, 1928. If the plaintiff first discovered the fraud or was put on inquiry within the meaning of the law after September 8, 1927, and not before, she would be entitled to the relief prayed for; if prior to that date, the action would be barred by the statute of limitations.

The evidence of the plaintiff as to the time of the discovery of the fraud is substantially as follows: On March 5, 1927, the date of the signing of the assignment, plaintiff wrote to Attorney N. T. Gadd, of Broken Bow, Nebraska, as follows: "I complied with your wish and I have a request to make to you and that is to send me a copy of my brother George's will. I will be very thankful to you if you will kindly do this." Plaintiff testifies that she never heard from Mr. Gadd, nor did she get a copy of the will from him. Plaintiff testifies that in the month of July of the same year she was in Broken Bow for a few days, but made no inquiry of defendant or any one else concerning the will. She states she went on east to Sabetha, Kansas, and returned to Broken Bow on her way home the latter part of October of the same year, at which time nothing was said by the defendant or other relatives concerning the will. She does testify, however, that her husband examined the records at the courthouse and informed her that she was mentioned in the will, and, on her return to Oregon, she had an attorney write to the county judge of Custer county for a copy of the will which she received on March 10, 1928. Her testimony also shows that, several years before the death of George Ayers, he told plaintiff that he would remember her. This constitutes practically all the evidence as to plaintiff's knowledge of the fraud.

Plaintiff knew on March 5, 1927, that her brother George had left a will. She also knew that he had intended to remember her, as she testified to this herself. On March 5, 1927, she wrote for a copy of the will, undoubtedly because she knew facts that caused her to believe that she would be mentioned therein. Even the letter of defendant's attorney, fraudulent as it is, did not lull her into an absolute belief that she was not mentioned therein, otherwise she would not have been interested in obtaining a copy of the will. She also knew that the estate of her brother was being probated in Custer county

and that an inquiry of the county court would have brought the desired information. Plaintiff was in Broken Bow in July of 1927, and made no inquiry of the court or of relatives. If she had made any reasonable inquiry she would have discovered facts that would have disclosed the fraud. If plaintiff had followed up the letter to Mr. Gadd, when he failed to reply, with a letter to the county court, the whole matter would have been disclosed. The whole affair was a matter of public record. The negligence of plaintiff in looking after her interests before and after September 8, 1927, is beyond comprehension. We assume that she is a reasonably intelligent and prudent woman. There is at least no evidence to the contrary. She was in possession of facts that should have placed her on inquiry. She had every opportunity to make inquiry, but negligently failed to do so.

This court has held in the case of *Welton v. Merrick County*, 16 Neb. 83, in an opinion by Judge Maxwell: "If a party with ordinary care and attention could have detected even fraud, he will be charged with actual knowledge of it; that is, the mere fact that a party is not aware of the existence of certain matters, where there is no concealment, will not prevent the running of the statute of limitations."

This court has also held: "An action for relief on the ground of fraud may be commenced at any time within four years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery." *Parker v. Kuhn*, 21 Neb. 413. See *Marshall v. Rowe*, 119 Neb. 591.

The plaintiff had knowledge of facts that not only should have, but did, put her on an inquiry according to her own evidence. The fact that she did not get an answer to her first inquiry will not permit her to negligently sit by and make no further effort to discover the fraud.

The question as to plaintiff's knowledge of facts which should put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to a discovery of the fraud, is a question of fact to be determined from all the evidence. No general rule can be announced covering all cases, but it is a question to be determined from the evidence and circumstances of each particular case.

The appellant argues that the statute of limitations can never be used in a court of equity to sustain a fraud, wrong or injustice and that this statute must be positively and absolutely established. The reason for the existence of a statute of limitations overcomes the argument. Negligence and lethargy are condemned by the law. In the case of *Wood v. Carpenter*, 101 U. S. 135, Justice Swayne says: "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and the antidote go together."

We therefore hold that, under the facts and circumstances of this case, the trial court was right in holding that plaintiff's claim was barred by the statute of limitations. For the reasons herein set out, the judgment of the trial court is

AFFIRMED.

HENRY KEHL, APPELLEE, V. OMAHA NATIONAL BANK, APPELLEE: FIRST NATIONAL BANK OF OMAHA, ADMINISTRATOR, INTERVENER, APPELLANT.

FILED APRIL 13, 1934. No. 28868.

1. **Appeal.** While the recitals in a judgment are presumptively true, an affirmative showing in the bill of exceptions that they are not true must prevail over the presumption.
2. **Evidence.** Records and memorandums made by a person in the ordinary course of his business of acts which his duty, in such business, requires him to do for others are, in case of his death, admissible evidence of acts so done.
3. **Husband and Wife:** GIFTS: JOINT TENANCY. Where a wife deposited money in a bank payable to herself or husband as joint tenants with a right of survivorship, and not as tenants in common, a completed gift is consummated by the wife to the husband, notwithstanding the fact that the husband never had manual possession of the pass-book.
4. ———: ———: ———. A deposit of money in a bank by a wife and made payable to herself and husband, with the express provision that it was a joint tenancy with survivorship, and not as tenants in common, is presumed to have been made by the wife with donative intent and for the benefit of the husband with the intention of giving to him, if he survives, the complete title to the funds. *In re Estate of Johnson*, 116 Neb. 686, followed.
5. **Joint Tenancy.** Section 8-164, Comp. St. 1929, relating to the payment by a bank of deposits entered as payable to any one of two or more persons named therein, not only is intended for the protection of the bank, but also fixed the property right of the persons named, unless the contrary appears from the terms of the deposit. *In re Estate of Johnson*, 116 Neb. 686, followed.
6. **Evidence:** NONEXPERT OPINION: MENTAL CAPACITY. If the mental condition of a person becomes a material subject of inquiry, a nonexpert witness may be permitted to state his opinion concerning that condition if he is shown to have had a more or less extended and intimate acquaintance with such person and gives the facts and circumstances upon which the opinion is based. The weight to be given such testimony is a question for the jury, to be considered by them in connection with the credibility and intelligence of the witness, and his opportunities for observation.
7. **Trial:** DIRECTION OF VERDICT. "If there be any testimony before the jury by which a finding in favor of the party on whom

rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. In reviewing such action, this court will regard as conclusively established every fact which the evidence proves or tends to establish, and if, from the entire evidence thus construed, different minds might reasonably draw different conclusions, it will be deemed error on the part of the trial court to have directed a verdict thereon." *Bainter v. Appel*, 124 Neb. 40, followed.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed.*

O. B. Clark and *Finlayson, Burke & McKie*, for appellant.

King & Haggart and *Wells, Martin, Lane & Offutt, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

CARTER, District Judge.

This suit was brought by Henry Kehl, husband of Christine Kehl, deceased, to recover from the Omaha National Bank the amount of a savings account standing in the name of Mr. and Mrs. Henry Kehl. The account was originally opened in 1920, and stood in the name of Mrs. C. Kehl until April 6, 1929, at which time the records of the bank were changed to a joint account. Henry Kehl's name was at this time added to the pass-book, the ledger account of the savings' department and the card in the central filing system. On August 5, 1930, a new pass-book was issued to Mr. and Mrs. C. Kehl. From April 6, 1929, until the date of her death, Mrs. Kehl made regular deposits in the account, using the pass-books on which her husband's name appeared. Mrs. Kehl died April 24, 1932. The signature card covering the account was not dated. Stamped on the face of the card with a rubber stamp was the following joint tenancy agreement: "It is agreed that the persons whose names are

signed hereon are the owners of the moneys deposited in this account as joint tenants with the right of survivorship and not as tenants in common, and the bank is authorized to pay out said moneys on the order of either during the lifetime of both, and after the death of either, said money shall be the property of and payable to the order of the survivor." The First National Bank of Omaha, administrator of the estate of Christine Kehl, deceased, was impleaded and assumed the defense. The Omaha National Bank admitted possession of the account in the sum of $6,860.86, and was interested in the litigation as a stake-holder only. John Lemly, a son of Christine Kehl by a former marriage, claims, through the First National Bank of Omaha, the administrator of Mrs. Kehl's estate, an interest as an heir in the account, alleging that the joint tenancy agreement shown on the records of the bank was unauthorized by Mrs. Kehl and, even if authorized, that she was incompetent at the time to enter into such an agreement. The trial court sustained plaintiff's motion for a directed verdict and, from an order overruling intervener's motion for a new trial, the intervener brings this appeal.

It is the contention of plaintiff that both parties moved for a directed verdict and that the sustaining of plaintiff's motion was equivalent to a verdict by a jury on the findings of fact. The record discloses, however, that plaintiff's motion for a directed verdict was made and sustained by the court before intervener moved to dismiss plaintiff's petition. Why intervener moved to dismiss after plaintiff's motion was sustained, we are unable to say. We fail to see, however, how it could in any way affect the proceedings held previous to the time it was made. The judgment entered recites: "The intervener thereupon moves the court to dismiss plaintiff's petition, and the plaintiff moves for dismissal of the petition of intervention and for findings and judgment thereon in his favor by the court." The judgment entered is in direct conflict with the proceedings shown in the bill of

exceptions. Under these circumstances the record shown by the bill of exceptions must prevail. This court has held: "A bill of exceptions duly allowed and certified by the trial judge imports absolute verity and its truthfulness cannot be assailed collaterally." *Gregory v. Kaar*, 36 Neb. 533. In the case of *Schlachter v. St. Bernard's Roman Catholic Church*, 20 S. Dak. 186, it was held: "While the recitals in a judgment are presumptively true, an affirmative showing in the bill of exceptions that they are not true must prevail over the presumption." We must therefore consider the case on the basis of a directed verdict for the plaintiff in which the intervener did not join.

Complaint is made that the records of the bank were not sufficiently identified to permit their introduction in evidence. The evidence discloses that the records of the bank were kept by numerous clerks and officials. At the time the joint tenancy agreement was placed of record in the bank, it appears that one Erickson handled the transaction for the bank and made the entries on the records. The record shows that Erickson died four or five days before the trial in the lower court was commenced. With Mrs. Kehl dead and Henry Kehl barred from testifying by statute, the question arises whether the evidence given by one McAllister, the auditor in charge of the books of the Omaha National Bank, was proper. Mr. McAllister identified the handwriting of Erickson, testified that he was familiar with the method of keeping the records before and after the date of the agreement in question, and stated that the entries pertaining to the transaction were made in the usual course of business. The Omaha National Bank is a mere stakeholder in the litigation and has no interest in the fund except as such. The trial court admitted the records in evidence over objection and the intervener alleges that this constitutes prejudicial error. The reasons justifying the admission of this class of evidence have not been touched upon to any great extent by this court. The reasons for its admission in evi-

dence are well set forth in 3 Wigmore, Evidence (2d ed.) sec. 1522, and we quote freely from this work:

"The situation is one where, even though a desire to state falsely may casually have subsisted, more powerful motives to accuracy overpower and supplant it. In the typical case of entries made systematically and habitually for the recording of a course of business dealings, experience of human nature indicates three distinct though related motives which operate to secure in the long run a sufficient degree of probable trustworthiness and make the statements fairly trustworthy: (1) The habit and system of making such a record with regularity calls for accuracy through the interest and purpose of the entrant; and the influence of habit may be relied on, by very inertia, to prevent casual inaccuracies and to counteract the possible temptation to misstatements. * * * (2) Since the entries record a regular course of business transactions, an error or misstatement is almost certain to be detected and the result disputed by those dealing with the entrant; misstatements cannot safely be made, if at all, except by a systematic and comprehensive plan of falsification. As a rule, this fact (if no motive of honesty obtained) would deter all but the most daring and unscrupulous from attempting the task; the ordinary man may be assumed to decline to undertake it. In the long run this operates with fair effect to secure accuracy. (3) If, in addition to this, the entrant makes the record under a duty to an employer or other superior, there is the additional risk of censure and disgrace from the superior, in case of inaccuracies,—a motive on the whole the most powerful and most palpable of the three."

Naturally, in the case at bar, if Mr. Erickson had been available, he could furnish the best evidence as to the transaction. But since his testimony is not available because of his death, logic and sound reason demand that justice should not fail because of conditions over which the parties have no control. In the case of *Nicholls v. Webb*, 8 Wheat. (U. S.) 326, Justice Story says: "If he

had been alive at the trial, there is no question that the protest could not have been given in evidence, except with his deposition, or personal examination, to support it. His death gives rise to the question, whether it is not, connected with other evidence, and particularly with that of his daughter, admissible secondary evidence for the purpose of conducing to prove due demand and notice. * * * The general objection to evidence, of the character of that now before the court, is, that it is in the nature of hearsay, and that the party is deprived of the benefit of cross-examination. That principle also applies to the case of foreign protests. But the answer is, that it is the best evidence the nature of the case admits of. If the party is dead, we cannot have his personal examination on oath; and the question then arises, whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove facts, where ordinary prudence cannot guard us against the effects of human mortality? Vast sums of money depend upon the evidence of notaries and messengers of banks; and if their memorandums, in the ordinary discharge of their duty and employment, are not admissible in evidence after their death, the mischiefs must be very extensive. * * * We think it a safe principle, that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done. It is of course liable to be impugned by other evidence; and to be encountered by any presumptions or facts which diminish its credibility or certainty." In the case of *Schmidt v. Scanlan*, 144 N. W. 128 (32 S. Dak. 608) it was held: "A bank cashier, who had knowledge of the methods of bookkeeping, etc., of bank employees before he was cashier, and was familiar with the records of the bank, could testify as to the custom of previous employees in entering bank transactions in the books, and to the import of such entries." We are,

therefore, of the opinion that the evidence complained of was properly admitted by the trial court.

Section 8-164, Comp. St. 1929, provides: "When a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business." In construing this statute and holding, under facts similar to the case at bar, that a donative intent was presumed, this court, in the case of *In re Estate of Johnson,* 116 Neb. 686, said: "We think that, when Johnson made the deposit payable to himself or to his wife, he must have known, and so he presumed, that the bank would pay the obligation to either himself or to his wife, and to no other person. We must assume that he knew of the statute, and that the bank would follow its provisions. We think the legislature must also have had that exact thought in mind when it enacted the law. We, therefore, hold that the legal title to the funds is fixed in the persons named in the certificates, and that the survivor, if one dies, takes the whole legal title." We, therefore, hold that the joint tenancy agreement herein set out operates as a gift from Mrs. Kehl to her husband, even though the actual enjoyment thereof by the husband was postponed until the death of Mrs. Kehl. "Section 8046, Comp. St. 1922, relating to the payment by a bank of deposits entered as payable to any one of two or more persons named therein, not only is intended for the protection of the bank, but also fixed the property right of the persons named, unless the contrary appears from the terms of the deposit." *In re Estate of Johnson,* 116 Neb. 686.

There being undisputed evidence establishing the joint tenancy agreement, and the rights of the parties having been fixed by statute, the trial court properly overruled intervener's motion to dismiss the action, made at the

close of plaintiff's evidence, for the reason that the evidence was insufficient to sustain a judgment.

The intervener next contends that, even if the making of the joint tenancy agreement is established, it cannot be upheld for the reason that Mrs. Kehl was mentally incompetent at the time it was made. The general rule is that the incompetency of a person to contract in a particular case is a question of fact to be decided by a jury, but that the legal effect of incompetency, admitted or proved, is a question of law. There can be no dispute that, in a civil case, it is for the court to decide whether sufficient evidence appears to justify the submission of the issue of incompetency to the jury; yet, if the evidence is conflicting or of such a character that different inferences might reasonably be drawn therefrom, it should be submitted to the jury.

In the case at bar, the plaintiff produced no evidence of the competency of the deceased on April 6, 1929, the date the joint tenancy agreement was made. The deceased is presumed to have been competent and the question for our consideration is whether the evidence of intervener is sufficient to require the consideration of the jury.

Intervener called several witnesses who testified that they had known Mrs. Kehl for long periods of time immediately before her death. The evidence generally was that deceased had suffered from diabetes and other ailments; that she had suffered at least two accidents by falling, once injuring her head and the other time breaking her hip; that her memory was not good and that she continually switched from one subject to another; that her tongue was thick and she could not talk very good; that she could not eat well and easily choked; that she was unable to reason and became very slovenly in her dress and appearance; that some of the witnesses wrote letters for her because of her bad eyesight; that she grew worse in 1929 and 1930; that she was absent-minded and got lost easily; that it was hard for her to get around;

that she was losing weight and her speech became disconnected; that she confused and forgot the names of her grandchildren that she well knew; and that she became confused and lost in her usual surroundings. While we have made no effort to detail the evidence of each witness, this is the general purport of the testimony.

Intervener complains of the trial court's rulings refusing to permit nonexpert witnesses to give their opinions as to the mental competency of the deceased. The rule in this state is: "If the mental condition of a litigant becomes a material subject of inquiry, it is competent to receive the opinion of a nonexpert witness, concerning that condition, where it appears that the witness has for years been intimately acquainted with the litigant, and the opinion is formed upon facts within the personal knowledge of the witness and sworn to by him before the jury." *Hilmer v. Western Travelers Accident Ass'n,* 86 Neb. 285. In *Clarke v. Irwin,* 63 Neb. 539, in reversing the trial court for excluding like evidence of a nonexpert witness, this court said: "It seems to be a well-settled rule that nonexpert witnesses who show a personal acquaintance with the person alleged to be insane, extending over a considerable period of time, and are shown to have a sufficient acquaintance to be able to form an opinion, after detailing to the jury the facts and circumstances upon which such opinion is based, are permitted to testify whether in their opinion such person is sane or insane. The established doctrine is that if the witness has sufficient opportunity for observation to enable him to form an opinion upon the question of the sanity of the person, then he is a competent witness, and may be permitted to testify to such opinion. This rule seems based upon sound reason. In fact, if the rule were otherwise, grievous hardship and injustice might frequently result. Cases might, and frequently do, arise in which medical experts differ as to whether the person in question is sane or otherwise. In such cases, in the absence of a rule permitting nonexpert witnesses to testify, the jury might not

be able correctly to determine whether the person was or was not insane. The qualification of the witness to give his opinion of the sanity of a person is a question resting very largely in the sound discretion of the trial court. There is no doubt that, had the witness McFarron given in detail all the facts and circumstances of his acquaintance with Irwin, the different times he had seen him, how he looked, talked and acted, and how he did business, his testimony would have had more probative force, and would have been of more value to the jury than as offered. But this objection goes rather to the weight than to the competency of the evidence. The weight to be given testimony is exclusively for the jury, taking into consideration the credibility and intelligence of the witness, and his opportunity for observation. *Hardy v. Merrill,* 56 N. H. 227, 241; *Schlencker v. State,* 9 Neb. 241; *Polin v. State,* 14 Neb. 540, 546; *Burgo v. State,* 26 Neb. 639, 643; *Connecticut Mutual Life Ins. Co. v. Lathrop,* 111 U. S. 612, 619; *State v. Lewis,* 20 Nev. 333. This evidence should have been received, and its exclusion was error."

We hold, therefore, that the court erred in not permitting the nonexpert witnesses, who qualified under the above rule, to give their opinion as to the mental competency of Mrs. Kehl. It is a fact that the jury are entitled to consider.

The question of mental incompetency is ordinarily one for the jury. In the case at bar, the relatives, neighbors and friends of Mrs. Kehl testified to their long acquaintance with her, to incidents in her life that indicate that she was not rational, and to facts showing that she was infirm because of age, accident and disease. The plaintiff made no attempt to contradict this evidence. One expert was called who testified in answer to a hypothetical question that, in his opinion, Mrs. Kehl was incompetent, but, when other facts were added to the question that were supported by the evidence, said that he could not correlate the two sets of facts and could form no opinion if all were true. Clearly, it is for the jury to determine the

facts. Competent evidence of Mrs. Kehl's incompetency was before the court. Under such circumstances the court erred in directing a verdict against intervener. This court has repeatedly held: "If there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. In reviewing such action, this court will regard as conclusively established every fact which the evidence proves or tends to establish, and if, from the entire evidence thus construed, different minds might reasonably draw different conclusions, it will be deemed error on the part of the trial court to have directed a verdict thereon." *Bainter v. Appel*, 124 Neb. 40.

For the reasons herein set out, the judgment of the trial court is reversed and the cause remanded.

REVERSED.

UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLEE, V. J. O. CURRY ET AL., APPELLANTS.

FILED APRIL 13, 1934. No. 28872.

1. **Contracts:** CONSIDERATION. "The consideration of a contract need not move to the promisor. A disadvantage to the promisee is sufficient, although the promisor derives no benefit therefrom." *Faulkner v. Gilbert*, 57 Neb. 544.
2. **Indemnity:** CONSIDERATION. That which would be sufficient as consideration for any other kind of a contract is sufficient on which to base a contract of indemnity.
3. ———: ———. Agreements of indemnity made subsequent to the execution of an indemnity bond are not void for want of consideration where the consideration is of a continuing nature.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

A. A. Rezac and *Lovely & Lovely*, for appellants.

Gaines, McGilton, McLaughlin & Gaines, contra.

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

CHAPPELL, District Judge.

The United States Fidelity & Guaranty Company, a corporation, appellee herein, executed a bond for Donohue Brothers Company, Incorporated, Omaha, Nebraska, running to and in favor of the Union Stock Yards Company of Omaha, Nebraska, conditioned that Donohue Brothers Company, Incorporated, would pay certain charges to be advanced by the Union Stock Yards Company in connection with their business. This bond was executed April 30, 1931, and was a continuing liability so long as the bond was in existence and not canceled by the United States Fidelity & Guaranty Company.

The bond provided "that, if the company shall so elect, this bond or renewal thereof may be terminated at any time * * * after one month's previous notice to the assured of such election, and * * * the company shall refund the premium paid less a *pro rata* part thereof for the time said liability shall have been in force. * * * That the agent hereby agrees to indemnify the company against any loss or damage it may sustain in consequence of such guarantee."

Defendant J. O. Curry, president of Donohue Brothers Company, Incorporated, executed an indemnity agreement on May 7, 1931, to protect appellee on the original bond. Defendant A. H. Frantz, who was a banker at Friend, Nebraska, and whose son was treasurer of Donohue Brothers Company, Incorporated, executed a like indemnity agreement on May 14, 1931. Donohue Brothers Company, Incorporated, failed to pay certain charges of November 15 to 18, 1931, to the Union Stock Yards Company, which charges were covered by the original bond, and the Union Stock Yards Company made claim against the appellee, United States Fidelity & Guaranty Company, and filed formal proof of such claim with the company. The United States Fidelity & Guaranty Company sent a notice by

registered mail to the indemnitors advising them of the claim, calling upon them to make payment thereof, and stated that, if they did not pay the claim within 10 days, the surety would pay it and thereafter look to the indemnitors for reimbursement, including all sums paid in satisfaction of the claim and any and all costs, damages and expenses incurred by the surety, including court costs and attorney fees. The indemnitors did not pay the claim. It was paid by the appellee to the Union Stock Yards Company, and receipt and release of the claim were executed by them.

Suit was then instituted against the indemnitors on their indemnity agreements. At the conclusion of the trial the court directed a verdict for the plaintiff. Defendants appeal.

Although other matters are raised in appellants' brief, we believe that they were properly disposed of by the trial court, and we conclude that the only question for our determination is whether there was any evidence to go to the jury upon the question of whether or not there was a consideration for the contracts of indemnity.

Appellants admit the execution of the original bond and the indemnity agreements, but contend that, because the evidence discloses that they did not receive the one dollar set forth in the indemnity agreements as part consideration therefor, and because the indemnity agreements were made after the original bond was executed, there was no consideration for the making thereof. We believe that these contentions are without merit and that the court properly directed a verdict.

The indemnity agreements, in so far as they are material to this case, both being identical in form, read as follows: "Whereas, the United States Fidelity & Guaranty Company, of Baltimore, Maryland, at the special instance and request of the undersigned indemnitor or indemnitors, became or is about to become surety on a certain bond * * * it is expressly understood and agreed that the obligation of suretyship assumed by said United

States Fidelity & Guaranty Company on behalf of said principal or principals above mentioned, both prior and subsequent to the execution of this instrument, including suretyship assumed by continuation or renewal of the original obligation of suretyship, is assumed at the special instance and request of said indemnitor or indemnitors, who especially warrant the making of such request and that his or their interest in the principal or principals and the giving of said bond is sufficient to and does constitute a valid consideration for the execution of this bond of indemnity. * * * In consideration of the premises and the sum of one dollar in hand duly paid to the indemnitor or indemnitors, the receipt whereof is hereby acknowledged, and for other good and valuable considerations, the said indemnitor or indemnitors hereby covenant and agree * * * to save harmless and keep indemnified the United States Fidelity & Guaranty Company, its successors and assigns, against any and all claims, suits, debts, costs, charges and expenses, including court costs and counsel fees at law or in equity, and against all liability, losses and damages of any nature whatsoever, which the United States Fidelity & Guaranty Company, its successors or assigns may sustain or be put to by reason of the execution by the United States Fidelity & Guaranty Company of said bond or any continuation or renewal thereof, on behalf of the said Donohue Brothers Company, Inc."

It will be noted that, at the time the original bond was executed, it provided that the agent agreed to indemnify the company against any loss or damage it may sustain in consequence of the bond; that the company had a right to terminate the bond at any time it so desired; that the provisions of the indemnity agreement make clear that the indemnitors contracted to indemnify the surety on the original bond for loss sustained by the surety in connection with the original bond whether the same was executed prior to the date of the indemnity agreement or

subsequent to the date thereof, and that the indemnity agreement further indemnified the surety for loss which might be sustained on account of the continuation of the original bond.

There are two kinds of consideration,—that which confers a benefit upon the promisor and that which causes a detriment to the promisee. Either is a valid consideration which will support a contract. *Homan v. Steele, Johnson & Co.*, 18 Neb. 652; *Faulkner v. Gilbert*, 57 Neb. 544; *Henry v. Dussell*, 71 Neb. 691; *Mack v. Mack*, 87 Neb. 819; *Southern Realty Co. v. Hannon*, 89 Neb. 802; *In re Estate of Griswold*, 113 Neb. 256; 13 C. J. 311; 6 R. C. L. 654, 658, secs. 67, 69.

In 31 C. J. 422, we find the following statement: "As a general rule, whatever would be sufficient as a consideration for any other kind of contract is sufficient on which to base a contract of indemnity. The consideration may consist of a benefit to the indemnitor, or of some detriment or injury to the indemnitee. A promise by the indemnitee to forego steps for his own protection or to exercise a forbearance which may be of benefit to the indemnitor may constitute a sufficient consideration." See, also, 31 C. J. 424, which is authority for the proposition that the incurring of indemnity liability is not void for past consideration where the consideration is of a continuing nature. In *Essig v. Turner*, 60 Wash. 175, the court said: "The appellants next insist that the obligation in suit is void for want of consideration. This contention is founded on the fact that it was executed some two weeks later than the original bond, the argument being that for the one obligation to constitute a consideration for the other they must have been executed contemporaneously. But while it is true that ordinarily a past consideration will not support a present promise, this obligation is not of that sort. Here, by the recital of the obligation itself, it is shown that it was executed as much to induce the bailors to continue as bail for their

principal as it was to induce its original execution. Since the bailors had the right to surrender the principal at any time and relieve themselves of their obligation, the indemnity bond had a present consideration as well as a past consideration, the former being of sufficient import to support its validity." Likewise, in *Carroll v. Nixon*, 4 Watts & Serg. (Pa.) 517, we find that eight days after execution of an administrator's bond the defendant wrote to the surety on the bond agreeing to indemnify him against loss in the consequence of his having become surety. The court held that the liability of the surety to be injured in the future was a continuing liability and that the consideration was a continuing consideration and sufficient to sustain the contract of indemnity. See, also, *Esch v. White*, 76 Minn. 220; Id., 82 Minn. 462; *Gamble v. Cuneo*, 162 N. Y. 634; *Carman v. Noble*, 9 Pa. St. 366; Addison, Law of Contracts (11th ed.) 1082.

Clearly, the appellee, United States Fidelity & Guaranty Company, as surety, suffered a detriment by continuing to remain as surety on the original bond after the date of the indemnity agreements. It is this continuing liability after the execution of the indemnity agreements that constitutes a consideration for them. The mere fact that the evidence discloses that the indemnitors did not receive the one dollar recited in the indemnity agreement as part consideration therefor will not take the case to the jury on the question of whether or not there was a consideration for the execution of such agreements. The consideration of a contract need not move to the promisor. A disadvantage to the promisee is sufficient, although the promisor derives no benefit therefrom. *Faulkner v. Gilbert*, 57 Neb. 544.

The judgment of the district court is

AFFIRMED.

EMILE REGOUBY, APPELLANT, V. DAWSON COUNTY IRRIGATION COMPANY, APPELLEE.

FILED APRIL 13, 1934. No. 28785.

1. **Eminent Domain**: INJUNCTION. The owner of land, who knowingly permits an irrigation company to enter thereon and expend large sums of money in the excavation and construction of an irrigation canal across his premises, cannot, thereafter, resort to a court of equity for an injunction to prevent the irrigation company from using such canal for irrigation purposes, but must seek his remedy in damages therefor.
2. ———: DAMAGES. Where land of a private person is appropriated for a public use, such person is entitled to be compensated for the land actually appropriated; in addition thereto, he may recover any special damages he has suffered by way of diminution in value of the remainder of his land, less any special benefits received. General benefits, however, are not deductible.
3. ———: ———. Where an irrigation company excavates its canal through the land of a private individual, without resorting to condemnation proceedings provided by statute, and carries on its system of irrigation for over two years without paying the owner any damages occasioned by the work, in an action for damages brought by the owner against such company, if it then appears that the owner has suffered additional damage because of the negligent construction of the canal, this element of damage can also be recovered in the action.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed in part, and reversed in part, and remanded, with directions.*

Frank M. Johnson and *Craft, Edgerton & Fraizer*, for appellant.

Cook & Cook, contra.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

CHASE, District Judge.

This is a suit in equity to enjoin an alleged continuing trespass upon real estate, and to recover damages resulting therefrom. From the decree of the trial court award-

ing plaintiff damages for the value of the land actually appropriated, and denying special damages and injunctive relief, the plaintiff has appealed.

This action was originally commenced on January 22, 1930, as an action at law in which the plaintiff sought to recover damages for the value of lands actually appropriated by the defendant for an irrigation canal; special damages to the remainder of the tract by way of diminution in value, and for injury to and destruction of crops and grass upon the land, alleged to have resulted from the damming up of surface waters by the canal embankment. On February 17, 1932, plaintiff filed an amended and supplemental petition, in which he appears to have abandoned his original theory. In the latter petition he invokes the powers of a court of equity for an injunction restraining the defendant from carrying on its system of irrigation through his premises, on the ground that the same amounts to a continuing trespass, and prays for general damages resulting from such trespass. In the defendant's answer to plaintiff's supplemental petition it seeks to justify its action by the claim that it is a duly incorporated and existing common carrier of water for irrigation purposes; that on March 25, 1896, the Farmers & Merchants Irrigation Company acquired, by warranty deed, a right of way for irrigation purposes across the land in question from one Alexander Regouby, father of plaintiff, and that through mesne conveyances this defendant became the owner of said right of way from the original grantee; that, in the latter part of the year 1926, the defendant constructed the irrigation canal in question; that, previous to the construction thereof, the plaintiff and defendant entered into an oral agreement whereby the right to construct the canal was granted to the defendant upon the defendant's promise to make certain improvements upon the plaintiff's land; that, in furtherance of this agreement, the canal was constructed and the improvements made, and that such agreement, in law, amounts to an irrevocable license to maintain the canal

across plaintiff's premises. The defendant denied any damage to crops resulting from the irrigation project. The plaintiff, in his reply, asserted that the right of way granted to the Farmers & Merchants Irrigation Company by his father, who was plaintiff's grantor, terminated by the permanent abandonment of the same in the year 1901; that for more than 20 years prior to the construction of the defendant's canal in 1926 the right of way of the original canal had been plowed over, continually farmed, and was wholly filled up and almost entirely obliterated.

It appears from the record that the plaintiff is the owner of the land in question, being 80 acres, rectangular in shape, which is traversed lengthwise by the defendant's irrigation canal in an easterly and westerly direction, somewhere near the middle, making the canal on plaintiff's land approximately 100 rods in length; that no attempt was made by the defendant to exercise any statutory right of eminent domain over the premises; that in the fall of 1926 the defendant began the construction of its canal, coming from the west and moving eastward. When the work approached plaintiff's premises, the defendant, through its officers, notified the plaintiff that they proposed to excavate across his land. The plaintiff, upon receipt of this notice, protested against the proposal, stating that he did not want an irrigation ditch dug through his premises. He was then notified by the officers of the defendant that they were going on through his premises with the canal and would proceed to carry out their design unless stopped by the courts. The plaintiff did not invoke the powers of the court to prevent the work, and the canal was completed through plaintiff's premises in the latter part of 1926. In 1927 irrigation waters were turned therein.

It appears that the land actually appropriated for the canal and its embankments consumed a strip about 100 rods long and 77 feet wide. It appears further that the portion of plaintiff's land lying to the north of the canal

is mostly rolling, and that prior to the construction thereof the surface waters that fell thereon were wont by nature to flow to the south through natural depressions, spreading out upon the level land, and finally disappearing by flux, percolation, and evaporation; that defendant's canal was constructed through the premises generally about the point where these undulations terminated at the edge of the plain; that by the throwing up of the embankments on the north side of the canal some of the surface waters from the north portion of plaintiff's land were dammed up, flooded back, submerging his crops, covering both them and the land with deposits of silt and drift. It further appears that in 1930 the water broke through the embankment of the canal scouring out a hole of considerable size and depth on plaintiff's premises near the western boundary thereof. Again in 1931 the embankment gave way, discharging the waters with such violence as to wash a gulch through plaintiff's land, passing therefrom, down to his farm home and filling the cellar of his residence with water.

The evidence shows without serious dispute that the Farmers & Merchants Irrigation Company in 1896 acquired a right of way by deed across these premises whereby there was conveyed a strip of land 75 feet wide. This conveyance contained the following provision: "Provided that in case said company * * * shall permanently abandon any survey or ditch made or to be made through said land, the same shall revert to and become revested in the said grantors herein, their heirs and assigns."

The defendant claims to have been the grantee of the right of way described in the original deed through mesne conveyances. The evidence also shows, practically without dispute, that in 1901 the Farmers & Merchants Irrigation company wholly abandoned its irrigation project through the land in question and never thereafter asserted it; that neither the original grantee nor any subsequent grantee through it attempted to claim a right of way through plaintiff's premises until the year 1926. From 1901 to

1926, approximately 25 years, the original irrigation project had been wholly abandoned and the right of way was farmed and used for agricultural purposes continuously in the same manner as the remainder of plaintiff's land was used; that originally some bridges had been placed across the canal and these had been removed and taken away. It will be noted that by the original conveyance that, if the company "shall permanently abandon any survey or ditch made or to be made, * * * the same shall revert to and become revested in the said grantors." There appears no evidence from which the Farmers & Merchants Irrigation Company in the original grant was divested of its right until the year 1912, eleven years after it had ceased to use the right of way for irrigation purposes. Such conduct, we must hold, amounts to a permanent abandonment of its surveys and ditch, and any right therein was lost by nonuser, hence the defendant could acquire no right in these premises by becoming the grantee of the right of way in the original deed.

While it appears that several conversations were had between plaintiff and representatives of the defendant concerning the construction of the proposed canal, and the manner in which the same was to be constructed, these conversations cannot be construed as an agreement, either express or implied, for a right of way across the premises. It does appear, however, that in these conversations, which occurred just prior to the beginning of the work, the plaintiff was informed by the defendant's officers that the canal was going to be excavated irrespective of plaintiff's objections, and if he believed his objections were well founded he would have to resort to the courts for relief. The plaintiff at that time made no attempt to stop the prosecution of the work, the canal was excavated and the irrigation project completed without paying the plaintiff anything by way of damages either for the land actually appropriated or otherwise. It further appears that after the work was completed the plaintiff, at various times before the commencement of his action,

called upon the president of the irrigation company demanding damages to his property growing out of the project, and the defendant refused to consider the plaintiff's demands.

Numerous grounds are urged by the appellant for reversal. The first that commends itself to our consideration is: Did the trial court err in refusing to grant an injunction preventing the defendant from carrying on its system of irrigation through the land in question?

According to our interpretation of the decree, the court based its findings as to this point upon the proposition that, by agreement of the parties, an irrevocable license was granted by the plaintiff to the defendant permitting it to do the things the plaintiff now complains of. We do not believe that such a conclusion is justly warranted by the evidence. Licenses sound essentially in contract and arise from an agreement of some character, either express or implied. The plaintiff's attitude at all times was that of objection rather than conciliation. No express agreement is shown, neither can one be implied from the conduct of the parties as disclosed by the record. It appears that the attitude of plaintiff, after he was informed that the defendant proposed to execute the work outlined, irrespective of his objections thereto, was that of pacifism for nearly three years. He lived on the premises and knew the canal was being excavated. He was informed that no effort would be made to ascertain his damage or pay the same unless he invoked the powers of the court in his behalf. Notwithstanding this, he allowed the defendant to expend considerable sums of money in the completion of its general system of irrigation. After the work was finished he applied to the defendant on several occasions to pay damages. He treated the whole situation as one entitling him to damages, rather than equitable relief by way of injunction. Under the statute the defendant had the power of eminent domain to condemn the plaintiff's premises and thus construct its irrigation project. The rule, not only in this state, but in many

others, is to the effect that where the owner of property knowingly permits a corporation, having power of condemnation for public purposes, to use or damage such property therefor, he is limited to his remedy in damages, and under such circumstances equity will ordinarily deny injunctive relief. *Hall v. Crawford Co.*, 94 Neb. 460; *Ensign v. Citizens Interurban R. Co.*, 92 Neb. 363; *Meyer v. City of Alma*, 117 Neb. 511. This rule is not based upon the theory of irrevocable license, but is based upon the theory of estoppel, growing out of the owner's election to resort to a law action for damages, rather than to a court of equity for an injunction. Although the action of the trial court upon this question cannot be supported on the theory of irrevocable license, we do adopt the view that the continued acquiescence on the part of the plaintiff, with full knowledge of what was being done by the defendant upon the premises, estopped him from obtaining injunctive relief.

The next question for our consideration is whether the trial court applied the proper rules for determining damages where the property of a private individual is taken or damaged for a public use. Section 21, art. I of the Constitution, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." This section of our Constitution has been construed by the court on numerous occasions, and the rule seems to be well settled that the appropriating party must pay for the value of the land actually taken or appropriated, also any depreciation in the value of the remainder of the tract caused by the construction of the work, excluding general benefits. *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205. If it appears that there is a general diminution in value of the remainder of the tract caused by the construction of the public work, that is a proper element of damage, and that element of damage can only be diminished by showing that there were benefits accruing specially to the particular tract of land in question. Where such is the case, special benefits may be

offset against special damages, but in no case are general benefits, such as accrue to other lands in the vicinity as well as the land in question, properly allowable as offsets against special damages. From our interpretation of the trial court's findings, this rule was not followed. Testimony was allowed on the part of the defendant to the effect that plaintiff's land was greatly increased in value because of its adaptability, along with other lands, for irrigation purposes. The court refused any special damages to the plaintiff, upon the apparent theory that the general benefits, not only to plaintiff's land, but also to other lands along the irrigation project, increased, rather than diminished, the value of the plaintiff's land, and thus allowed such general benefits to be offset against special damages. In failing to apply this well-settled rule of damages to the facts, the court committed error.

The defendant appropriated a strip of land approximately 100 rods in length and 75 feet in width, containing about 3 acres. Along the west line of plaintiff's premises, where the canal entered, the banks of the canal broke, allowing water to escape therefrom, and in repairing that aperture, the defendant appropriated more of plaintiff's land for the purpose of borrowing earth to reconstruct its dikes. The trial court did not make any allowance to plaintiff for the land actually used in making this repair, nor for any damage to the land on the lower side of the canal occasioned by the water breaking through and washing holes therein. It appears that at one place there was a hole scoured out some 200 feet across and nearly 14 feet in depth, caused by the water breaking through the canal dike. The court should have allowed the plaintiff for the value of the land actually appropriated included within the boundary lines of the survey, and also that appropriated for the purpose of borrowing earth to reconstruct the dike. These two items are land actually appropriated. Whatever land was eroded on the lower side of the embankment by the breaking over of the water was not land appropriated for public use.

There is also evidence that on the north side of the canal, toward the eastern boundary of plaintiff's land, is a depression leading down into the general valley; that the defendant's irrigation canal crossed this depression; that in the construction of the canal it threw up a dike along the north side thereof, thus obstructing the natural flow of surface waters that fell upon the higher ground, forcing them back, submerging the plaintiff's crops in water, and leaving deposits of silt and drift. If such items of damage can be reasonably anticipated when special damages to the remainder of the tract are allowed, such an allowance of special damages will include items of the character complained of. It also appears that following a freshet the embankment on the lower side broke and the surface waters, which the defendant had collected in its canal, were permitted to discharge in a volume, scouring out a gulch, flooding the basement of plaintiff's residence and leaving deposits of débris and silt. For these items defendant sought to minimize plaintiff's damages by taking the water out of the basement and building new cement walls under the house. The courts hold that damages caused unnecessarily by negligence and improper construction of the improvement, which could not have been anticipated when the special damages to the remainder of the tract were assessed, are additional items to be recovered. *Bunting v. Oak Creek Drainage District*, 99 Neb. 843; *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550.

The trial court denied plaintiff any damage occasioned to his crop by the overflow of his land, covering it with silt and débris, and also denied him damages for the erosion caused by the breaking over of the canal embankment. The trial court should have allowed plaintiff damages such as were fairly and justly warranted by the evidence, as follows: The value of the land actually taken by the canal, and borrowed earth used in the reparation thereof; special damages to the remainder of the tract occasioned by the project that could have been properly

anticipated, such as inconvenience in husbandry, moving of fences, drainage of ponds and sloughs, and the like, and from this item there should have been deducted whatever amount such damages were lessened by the building of bridges and the construction of fences. No offset against plaintiff's special damages should have been allowed for general benefits to the land in question which are enjoyed by all the irrigable land tributary to the canal. In addition to the above, any resultant damage occasioned by the negligence of the defendant in the construction of its canal, such as overflowing and flooding of plaintiff's land, which cannot be reasonably anticipated in the allowance of special damages. From this item there should be deducted whatever amount the defendant has minimized the same by repairing flood damage to plaintiff's residence. The trial court was correct in refusing the injunction, but committed error in misapplying proper rules of damages.

That part of the decree denying the injunction is affirmed, but in all other respects the same is reversed and the cause remanded, with instructions to compute the damages in accordance herewith.

AFFIRMED IN PART, AND REVERSED IN PART.

LOUIS THIES, APPELLEE, V. FRED W. WEIBLE: FARMERS UNION LIVE STOCK CREDIT ASSOCIATION, INTERVENER, APPELLANT.

FILED APRIL 13, 1934. No. 28743.

1. **Execution.** A creditor, by the levy of an execution, acquires no greater rights in the property levied upon, than the judgment debtor had at the time of the seizure. *Held*, under the evidence in this case, that the appellee, as judgment and execution creditor, acquired no right or interest in the property levied upon, and the trial court erred in rendering judgment awarding the fund in controversy to appellee.
2. **Corporations.** Where the law authorizes the formation of a cor-

poration and there has been an attempt in good faith to organize, the requirements of the statute have been colorably complied with and corporate functions exercised thereunder, there exists a corporation *de facto*, the corporate functions of which, ordinarily, cannot be called into question collaterally, although some of the persons exercising the franchise of being a corporation may have been ineligible and incapacitated by the law to act as incorporators or stockholders.

3. ———: CHATTEL MORTGAGES. The validity of a mortgage made by a corporation *de facto* cannot ordinarily be attacked on the ground of the want of incorporation, either by the mortgagor or by persons claiming under it or by third persons.

4. ———: ———. *Held*, under the undisputed facts in this case, that the chattel mortgage of appellant was a valid lien upon the property levied upon and it is entitled to the money derived from the sale of said mortgaged property and deposited with the sheriff, under the stipulation of the parties to this action.

APPEAL from the district court for Wayne county: CHARLES H. STEWART, JUDGE. *Reversed, with directions.*

Henderson, Hatfield & Wadden and *Fred S. Berry*, for appellant.

Davis, Hendrickson & Davis, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

HASTINGS, District Judge.

This case involves a controversy over $700 in the hands of the sheriff of Wayne county. The money is claimed by the Farmers Union Live Stock Credit Association, appellant, and by the appellee, Louis Thies. The trial court ordered the money paid to the appellee. The Farmers Union Live Stock Credit Association appeals.

The principal assignments of error are that the findings and judgment are not sustained by the evidence and that the judgment is contrary to law.

The facts are not in dispute. The Weible Mercantile Company, claiming to be a corporation, with its principal place of business at Winside in Wayne county, placed an order with the Farmers Union Live Stock Commission

Company of Sioux City to purchase for it about 60 head of cattle. The appellant, the Farmers Union Live Stock Credit Association of Sioux City, Iowa, had previously agreed with the Weible Mercantile Company to loan it the money necessary to purchase the cattle. The appellant, under said agreement, was to pay the money direct to the Farmers Union Live Stock Commission Company and the Weible Mercantile Company was to execute its note, due in six months, secured by a chattel mortgage upon said cattle, for the amount of money paid by the appellant with interest added to maturity. About the 25th of March, 1932, the Farmers Union Live Stock Commission Company sold and delivered 38 head of cattle to the Weible Mercantile Company and 28 head on or about the 7th day of April, 1932. The appellant, pursuant to said agreement, paid the purchase price for the cattle direct to the Farmers Live Stock Commission Company, and the Weible Mercantile Company executed and delivered its note to the appellant, due in six months after date, for the sum of $1,935.33, together with a chattel mortgage on all of the cattle purchased to secure the payment of said note. The mortgage was filed in the office of the county clerk of Wayne county on April 8, 1932, at 8:15 o'clock a. m.

The appellee, Louis Thies, as plaintiff in an action in the district court for Sheridan county, on February 8, 1932, obtained a judgment against Fred W. Weible and Fred Thies and Helen Weible, as defendants, for the sum of $650. The transcript was filed in the office of the clerk of the district court for Wayne county on the 23d day of February, 1932. An execution was issued thereon on April 7, 1932, directed to the sheriff of that county commanding him to levy upon the property of the defendant Fred W. Weible. The sheriff, acting under said execution, on April 7, at 5 p. m., made a levy upon 26 of the 28 head of cattle delivered to the Weible Mercantile Company on the 7th day of April, 1932. At the time of the levy said cattle were in a yard of said Weible Mer-

cantile Company at its place of business in Winside. The cattle on which the sheriff claimed to have levied as the property of Fred W. Weible were not moved by him or any arrangements made for their feed or care. About April 10, 1932, the appellant, with the consent of the mortgagor, took possession of the entire 58 head of cattle covered by its mortgage and transported them to Sioux City, Iowa. Shortly thereafter a written stipulation was entered into between the appellee, Louis Thies, and the appellant, Farmers Union Live Stock Credit Association, to the effect that it should sell the cattle levied upon and deposit $700 of the proceeds of the sale with the sheriff of Wayne county to be held by him pending a determination of the ownership of the cattle and the rights of the respective parties thereto, and that said appellant should file a petition in the district court for Wayne county setting up its claim and right, and that appellee should file an answer thereto setting up his claim and right, and the entire matter should be submitted to said court for adjudication. Pursuant to said stipulation the appellant deposited the $700, now involved in this action, with the sheriff, filed its petition setting up its claim to the cattle levied on, and the appellee filed his answer thereto.

After the trial and before judgment was entered, appellant filed an amendment to paragraph 7 of its petition to conform to the proof. Notice of such amendment was given attorneys for appellee. No order appears in the record giving leave to amend. Consideration of the amendment by us is objected to by appellee. The amendment made was in conformity to the proof, no objection was made thereto but was acquiesced in by appellee and will be considered as a part of the petition.

The appellant alleged, in substance, in its petition, as the basis of its right to the fund of $700, the facts in relation to the sale of the cattle, the furnishing of the money by it to pay for the cattle in question by the Weible Mercantile Company, and that said mortgage contained a provision that the note secured thereby should

immediately become due if the cattle or any part thereof were levied upon or if they were not given proper feed and care, and giving appellant the right to take possession thereof, and, the cattle having been levied upon, appellant, pursuant to said provision in said mortgage, with the consent of the mortgagor, took possession of said cattle.

The appellee alleged, in substance, in his answer, the levy by the sheriff upon 26 head of cattle on the judgment in his favor against Fred W. Weible, and further alleged that said Fred W. Weible had been for several years involved financially, with judgments for large amounts against him which are wholly unsatisfied; that he endeavored to hide and conceal his property so that his creditors could not reach the same by pretending to organize the Weible Mercantile Company, which is an alleged corporation composed of Fred W. Weible, Helen Weible, his wife, and two minor children of Fred W. Weible and his wife; that the minor children are of tender years and are unable to contract; that said alleged Weible Mercantile Company, if it ever existed as a corporation, no longer exists as such because of its failure to comply with the laws of the state of Nebraska relative to existing corporations, and that said corporation never did exist because the incorporators thereof were unable to enter into and become incorporators.

It is contended by counsel for appellant that the judgment debtor, Fred W. Weible, had no interest in the property levied upon and therefore the appellee acquired no interest therein by the levy. It is fundamental that a creditor, by the levy of an execution, acquires no greater rights in the property levied upon than the judgment debtor had. If the debtor had no interest in the property, the creditor acquires none. *Friedlander v. Ryder*, 30 Neb. 783. The evidence does not disclose that the judgment debtor ever owned the property levied upon or had any interest therein. The cattle were not sold to him, nor did the appellant undertake to pay for the cattle

for him. He paid nothing for the cattle, nor did he become obligated to pay for them. The cattle were sold to the Weible Mercantile Company as a corporation. As far as the appellant was advised, the judgment debtor had no interest or ownership therein. It is not alleged in the answer nor is there any evidence to the effect that the judgment debtor, Fred W. Weible, ever transferred any of his property to the Weible Mercantile Company or that he had any interest therein, other than as its manager and secretary. The judgment debtor, Weible, having no ownership or interest in the property levied upon, the appellee, as judgment and execution creditor, acquired no interest or right in the property by reason of the levy.

The stipulation under which the money was placed in the hands of the sheriff was that the same was to be paid to the party the court adjudged established a right to said fund. It is claimed by the appellee that, though no right was acquired by the levy of the execution, the chattel mortgage given by the Weible Mercantile Company was void, and therefore appellant has shown no right to the fund. The right of the appellant to the fund in question depends upon whether the chattel mortgage on the cattle levied upon was good as between the appellant and the Weible Mercantile Company; if so, the appellee is not in a position to question its validity. He was not a creditor of the mortgagor. Comp. St. 1929, sec. 36-301; *Security State Bank v. Schomberg,* 119 Neb. 598; *Sanford v. Munford,* 31 Neb. 792; *Reiss v. Argubright,* 3 Neb. (Unof.) 756.

It is claimed by appellee that the chattel mortgage was void between the parties for the following reasons: (1) That the Weible Mercantile Company never had any existence as a corporation; (2) that the description of the cattle in the mortgage as to the cattle levied upon was insufficient; and (3) that the Weible Mercantile Company was not the owner of the cattle at the time of the execution of the mortgage. It is urged by appellee that

the Weible Mercantile Company never had any existence as a corporation, for the reason that some of the incorporators and others, who are stockholders therein, are infants. The answer, in effect, admits a colorable attempt on the part of the alleged incorporators to organize a corporation. The record shows that articles of incorporation, duly signed and acknowledged by the corporators, were adopted by the Weible Mercantile Company on December 3, 1927, and filed and recorded in the office of the county clerk of Wayne county on December 7, 1927, and also that such articles were filed and recorded in the office of the secretary of state on December 9, 1927. The Weible Mercantile Company, since the filing of its articles of incorporation, has continuously carried on and transacted the business of buying and selling live stock, grain and feed, and groceries, as provided for in its articles of incorporation. It has elected officers to carry on the said business, adopted and used a corporate seal, and during all of said time the judgment debtor, Fred W. Weible, has been the managing officer and secretary thereof. Furthermore, it has made and published statements as to its financial condition.

Section 24-201, Comp. St. 1929, provides that any number of persons may be associated and incorporated for the transaction of any lawful business, and infants are not expressly excluded by the statute as persons who may not associate themselves with others in forming corporations. We do not find it necessary in this case to decide whether they may do so or not. Although a *de jure* corporation may not have been formed, owing to the incapacity of some of the corporators, we are convinced that there was a corporation *de facto* whose existence cannot be questioned by appellee in this action. The general rule is: "When persons assume to act as a body, and are permitted by the acquiescence of the public and the state to act as if they were legally a particular kind of corporation, for the organization, existence, and continuance of which there is express recognition by the

general law, such a body of persons is a corporation *de facto*, although the particular persons thus exercising the franchise of being a corporation may have been ineligible and incapacitated by the law to do so. This is on the same principle on which it is held that a person may be a *de facto* officer, although ineligible." 1 Clark and Marshall, Private Corporations, 260, par. g. See 1 Fletcher, Cyclopedia Corporations, 595, sec. 292; *American Salt Co. v. Heidenheimer*, 80 Tex. 344, 26 Am. St. Rep. 743.

We have frequently held: "Where the law authorizes a corporation and there has been an attempt in good faith to organize, and the requirements of the statute have been colorably complied with and corporate functions thereunder exercised, there exists a corporation *de facto* which ordinarily cannot be called into question collaterally." *Haas v. Bank of Commerce*, 41 Neb. 754. See, also, *Lusk v. Riggs*, 70 Neb. 713; *Kleckner v. Turk*, 45 Neb. 176; *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200; *Lincoln Building & Savings Ass'n v. Graham*, 7 Neb. 173.

The reason a collateral attack by a third person will not avail against a corporation *de facto* is that, if the rights and franchises have been usurped, they are the rights and franchises of the state, and it alone can challenge the validity of the franchise. Until such interposition, the public may treat those in possession and exercising corporate powers under color of law as doing so rightfully. The rule is in the interest of the public and is essential to the safety of business transactions with corporations. It would produce disorder and confusion, embarrass and endanger the rights and interests of all dealing with the association, if the legality of its existence could be drawn into question in every suit in which it is a party or in which rights were involved springing out of its corporate existence. 1 Fletcher, Cyclopedia Corporations, 545, sec. 276; *Duggan v. Colorado Mortgage & Investment Co.*, 11 Colo. 113; 14 C. J. 204-207; 7 R. C. L. 60, sec. 42; 1 Clark and Marshall, Private Corporations, 241, sec. 82.

Speaking of an attempt to question the legal existence of a corporation, this court has said in *Haas v. Bank of Commerce, supra:* "It would be intolerable to permit in any civil action, to which such a body was a party, an inquiry into the legal right to exercise corporate functions —a right which it is for the state alone to question in appropriate proceedings for that purpose. On this there is a substantial unanimity in the authorities."

The attempt is made in this case, although the corporation is not even a party to the action. "A mortgage made by or to a corporation *de facto* is as valid as if it were made by or to a corporation *de jure*, and cannot be attacked on the ground of want of incorporation, either by the mortgagor or by persons claiming under him or it, or by third persons." 1 Clark and Marshall, Private Corporations, 234, sec. 3.

In this case the appellant dealt with the Weible Mercantile Company in good faith, believing that it was a corporation, and was entitled to assume that the corporation rightfully possessed corporate powers. The appellee, having acquired no right or interest in the mortgaged property by reason of the levy, will not be permitted to make a collateral attack on the existence of the Weible Mercantile Company as a corporation.

The claim of appellee that the description of the cattle in the mortgage is insufficient is without merit. The description of the cattle in the mortgage is full and complete. They are identified by brand, color, weight, breed, number and location. The description was sufficient, not only as between the parties, but as against everyone. *Security State Bank v. Schomberg*, 119 Neb. 598; *South Omaha Nat. Bank v. Stewart*, 75 Neb. 716; *Farmers & Merchants State Bank v. Sutherlin*, 93 Neb. 707.

The contention of the appellee that the Weible Mercantile Company was not the owner of the cattle levied upon at the time of the execution of the chattel mortgage is based upon the fact that the mortgage and the note secured thereby bear date of March 30, 1932, while the

account of purchase of the cattle shows that they were purchased by the Farmers Union Live Stock Commission Company of Sioux City, Iowa, for the Weible Mercantile Company on April 7, 1932, and paid for on that date by the appellant. The cattle were purchased from four different parties in the market at Sioux City, Iowa. The account of purchase shows the number of cattle purchased from each of said parties, together with the description of each head of cattle, with their weight, the price per hundred-weight, the price paid for each, and the total amount of the purchase price. While the presumption is that an instrument was executed on the date that it bears, it may be shown by other facts and circumstances to have been executed at another and different date. It is quite obvious that the date of the mortgage and the note do not correctly show the actual date of their execution. Taking into consideration the fact that the cattle were purchased in the market and paid for on April 7, their description would not have been known on March 30, so they could have been described in the mortgage as they are described, nor would the amount of the purchase price have been known. Whatever may have been the reason for antedating the note and mortgage, it is quite clear that neither the note nor the mortgage was executed until after the cattle had been purchased and paid for on April 7.

It follows from what has been said that at the time of the levy appellant, under its chattel mortgage, had a valid lien upon said cattle; that there was a breach of the condition of said mortgage giving appellant the right to possession of said cattle, and under the stipulation of the parties and the issues joined thereunder, appellant was entitled to the fund in the hands of the sheriff.

The trial court erred in adjudging that the sheriff pay the fund in question to the appellee. The judgment is reversed and the cause remanded, with directions to enter judgment for the appellant, and directing that payment of the fund in question be made to appellant.

REVERSED.

MAYME CONROY, APPELLANT, V. JOHN H. GARRIES ET AL., APPELLEES.

FILED APRIL 13, 1934. No. 28844.

1. **Principal and Agent.** Where, in the course of dealings between a loan company and purchaser of notes secured by mortgage, the company collects the principal and interest for the holder, its authority to collect other notes as agent of the holder may be implied, in the absence of satisfactory evidence to the contrary.
2. ———. The fact that the party to whom payment is made of a negotiable bond or note did not have the same in his possession is not conclusive upon the question of his authority to collect, but is a circumstance to be considered upon that question.
3. ———. Authority of an agent to collect the interest coupons on a negotiable bond of itself affords no basis for an implication of his authority to collect the principal.
4. **Appeal.** While this court is required to try an equity action *de novo*, where evidence on material issues is in irreconcilable conflict, the court will consider the findings of the court below.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed, and remanded with directions.*

Tibbets, Canaday & Hewitt, for appellant.

Carrico & Carrico, contra.

Heard before ROSE and PAINE, JJ., and LIGHTNER, REDICK and THOMSEN, District Judges.

REDICK, District Judge.

Action for foreclosure of real estate mortgage. April 30, 1927, Katherine E. and William L. Daugherty procured a loan in the sum of $4,000 from the firm of Hoeppner and Uerling who, at that time, were conducting a real estate and loan business in the city of Hastings, Nebraska. The Daughertys executed and delivered to Ernest Hoeppner, a member of said firm, three coupon bonds in the sums of $1,000, $1,000, and $2,000, respectively, due April 30, 1930, with interest at 5½ per cent. payable semiannually, and for the purpose of securing

said loan executed a mortgage upon 80 acres of land in Adams county. On March 18, 1930, Hoeppner sold, assigned and transferred these bonds and the mortgage to the plaintiff. July 18, 1927, the defendant John H. Garries purchased the land and received a warranty deed from the Daughertys subject to the $4,000 mortgage. The notes matured April 30, 1930, and shortly thereafter the defendants executed and delivered to Hoeppner three extension agreements extending the payment of the aforesaid bonds for a period of three years.

Interest was promptly paid on the notes by the defendants up to and including the interest coupon on the extension agreement due April 30, 1931. There is some dispute whether the coupon due October 30, 1931, was paid by defendants, but the books of the bank indicate that Hoeppner and Uerling paid the plaintiff $110 on that date, being six months' interest in full on $4,000.

The notes contained a provision that $100 or multiple thereof might be paid upon the principal at the due date of any coupon. May 27, 1931, the defendants paid Hoeppner and Uerling $1,004.60 upon the loan, being the principal of one of the notes, with interest from April 30 preceding. This sum was not paid to the plaintiff nor any notice given her of the payment, but, as above stated, they paid plaintiff the interest on the entire $4,000 up to October 30, 1931. On March 3, 1932, the firm failed and a receiver was appointed to take charge of its affairs. Defendants refused to pay the interest on the $4,000 bonds which became due April 30, 1932, but tendered plaintiff $82.50, being the amount of interest claimed by them to be due on the balance of said loan. This foreclosure action is based upon the default in the payment of the full amount of interest on $4,000 April 30, 1932.

Upon trial the lower court found and decreed that the payment by defendants of $1,000 to Hoeppner and Uerling constituted payment to the plaintiff, and that the tender of interest on the balance was a proper tender, and that, no default having been made by defendants, plaintiff is

not entitled to foreclosure. Plaintiff appeals and the only question presented is whether or not Hoeppner and Uerling were the agents of the plaintiff duly authorized to receive the payment in question; the defendants claiming they were such agents and the plaintiff denying that fact.

The case being in equity, the parties are entitled to a trial *de novo* on this appeal, and we have examined the record with great care. The evidence establishes without dispute the matters contained in the above statement of facts. The defendants had no knowledge of the assignment of the notes and mortgage to plaintiff and paid the interest regularly to Hoeppner and Uerling, receiving in each instance the appropriate coupon, except the one due October 30, 1931, payment of which is disputed, defendants testifying to such payment and that Hoeppner claimed he was very busy and would mail him the coupons. Upon making the payment of $1,000 defendants did not demand the return of their bond but took a receipt from the firm by Uerling who said he would give them proper credit.

There is serious dispute as to whether or not Hoeppner and Uerling had the bonds in their possession at the time of the interest payments. Defendant John H. Garries and his wife, Ura, both testify that, when they went to make the payments, Uerling, or the party receiving the payment, would go to another part of the banking room, and they would see him take the bonds and with a pair of scissors clip the coupons and bring them forward for delivery to defendants. The daughter of defendants, who testified that she was present when most of the payments were made, does not testify that she saw the coupons clipped from the bonds. On the other hand, plaintiff testifies that she had several transactions involving the purchase of loans from Hoeppner and Uerling, and that in every instance, including the loan in question, she took possession of the notes, mortgage and assignment, placed them in her safety deposit box in the First National Bank of Hastings, and that when coupons became due she would

go to the box and clip them and take them to Hoeppner and Uerling who would pay them by check and collect from the mortgagors. The plaintiff is corroborated by J. H. Uerling who testified that when plaintiff bought the notes and mortgage they were delivered to her together with the assignment, taken away by her, and were not thereafter in the possession of the firm, and that he never clipped any coupons, but that she would clip them and bring them in and they would give her a check. This presents a serious conflict on an important question of fact, and it is exceedingly difficult, if not impossible, upon a mere study of the printed record, to determine which witnesses are telling the truth. It may be observed, however, that the testimony of plaintiff and Uerling is more consistent with ordinary business usage in such matters, the purchaser of securities generally taking them into his own possession. In this situation we think it proper to take into consideration the finding of the trial judge who saw the witnesses and heard them testify and was thus in better position to judge of their credibility than is this court. *In re Estate of Waller,* 116 Neb. 352; *Peterson v. Winkelmann,* 114 Neb. 714; *Jones v. Dooley,* 107 Neb. 162. We think it must be taken as established that the securities were not in the possession of Hoeppner and Uerling at the time of the payment of interest or the $1,000. As to the possession of the extension agreement, the evidence is not so specific, but the receiver testifies that neither the original securities nor the extension agreement were found among the papers of the firm when he took possession, warranting an inference that they were with plaintiff. Up to this point the evidence will warrant the inference that Hoeppner and Uerling were the agents of the plaintiff for the collection of the coupons, but none that they were authorized to collect the principal. *Walsh v. Peterson,* 59 Neb. 645; *Campbell v. O'Connor,* 55 Neb. 638; *Richards v. Waller,* 49 Neb. 639.

There is, however, further evidence bearing upon the

question of the authority of Hoeppner and Uerling to receive payment of the principal as the agent of the plaintiff. It appears that the firm was engaged in the business of making loans and selling the same to persons generally in Hastings and vicinity; also that they had sold to the plaintiff from four to seven (plaintiff admits four) other loans, and that their custom of handling them was to collect, not only the interest, but the principal and pay the same to the plaintiff. On this point the plaintiff testifies on cross-examination: "Q. Mr. Uerling did your loan business generally, didn't he? A. I went there to purchase my loans, but that's about all. Q. You had several? A. Yes, sir. Q. And you had some there which had been paid through Hoeppner and Uerling and you got your money? A. Some of them; yes. Q. And that was the way you generally collected your money, through Hoeppner and Uerling? A. I went in there and bought bonds and mortgages. * * * Q. I understood you to say you had five, six or seven loans there at different times within the last five years. * * * A. Well, I had about four, I think. Q. And some of those loans were paid, weren't they? A. No. Q. Haven't you had some loans paid there within the last five years? A. Yes, one. Q. And that was paid through the office of Hoeppner and Uerling? A. Yes, sir. Q. And Hoeppner and Uerling paid you the money? A. Yes, sir. Q. And it was your custom to go to the office of Hoeppner and Uerling to get your interest on the loans? A. Yes, sir. Q. And it was your custom to go there to get your principal when it was paid in? A. Yes; when it was paid in. Q. The principal that was paid in, was that paid in when the loan matured? A. Yes; some of them. Q. And when you testify that had been paid, that was when the loan matures, was it? A. I don't recall that; it was so long ago." This testimony of plaintiff is corroborated by that of Uerling, and while his credibility as a witness may be subject to serious question, it is entitled to some weight as being in consonance with plaintiff's admissions. Proof of authority of party to be charged as agent may

be implied from facts and circumstances arising in the course of the relations between the holder and the alleged agent with regard to the note. *Kile v. Zimmerman,* 105 Neb. 576.

We think this evidence establishes that, while the plaintiff retained possession of her securities, she relied upon Hoeppner and Uerling to look after them and collect the interest and principal when due and pay it to her; that she expected them to do that very thing. These facts, in law, constituted Hoeppner and Uerling her agents, not only ostensibly, but actually, for the collection of the principal. *Bliss v. Falke,* 125 Neb. 400. The mere fact that Hoeppner and Uerling did not have possession of the notes is not conclusive of no authority to collect the principal. *Thomson v. Shelton,* 49 Neb. 644. We therefore conclude that the payment of $1,000 and interest was made by defendants to the agents of the plaintiff and she must bear the loss occasioned by their dishonesty.

Plaintiff cites a number of authorities from this state to the proposition: "If a mortgage secures a debt evidenced by negotiable paper, a mortgagor must, at his peril, pay it to the legal owner and holder of such paper." This is correct so far as it goes, but is an incomplete statement of the principle, because the mortgagor may pay to the holder of his paper "or his authorized agent," and there was no question of agency in any of the cases cited. In one of those cases, *Bettle v. Tiedgen,* 77 Neb. 799, it was held that "such payment to said original mortgagee will not, *in the absence of proof of agency, estoppel, or the like,* operate as a discharge of the debt secured by such mortgage."

Where a purchaser of securities from an investment or loan company, in the regular course of their dealings, permits the company to collect the interest and principal, she thereby constitutes such company her agent for those purposes. *Harrison Nat. Bank v. Austin,* 65 Neb. 632; *Holt v. Schneider,* 57 Neb. 523; *Stuart & Co. v. Stonebraker,* 63 Neb. 554; *Pine v. Mangus,* 76 Neb. 83; *Phoenix Ins.*

Co. v. Walter, 51 Neb. 182; *Bliss v. Falke*, 125 Neb. 400; *Faulkner v. Simms*, 68 Neb. 295.

We think the evidence establishes the agency of Hoeppner and Uerling, and finding no error in the record, the judgment of the district court is affirmed, with leave to defendants to bring up the default of interest or otherwise within 60 days from the going down of the mandate, and in such event the district court shall dismiss the action without prejudice at the cost of the plaintiff. If default is not made good within the time limited, the district court is directed to enter a decree of foreclosure for the sum of $3,000 principal, together with interest and any other sum to which plaintiff may be entitled.

AFFIRMED, AND REMANDED, WITH DIRECTIONS.

STATE, EX REL. WALTER LOSEKE, RELATOR, V. CHARLES B. FRICKE ET AL., RESPONDENTS.

FILED APRIL 14, 1934. No. 29193.

1. **Statutes:** CONSTITUTIONALITY. An enrolled bill, signed by the presiding officer of each house of the legislature and approved by the governor, imports verity as to its passage, and its passage can only be overthrown by the journals of the house or senate showing affirmatively that the bill was not passed in the manner prescribed by the Constitution.
2. ———: ———. The singular number often includes the plural. This rule is applicable where the state senate has passed a bill and the house of representatives has amended the bill in several particulars, and returns the amended bill to the senate, and the latter's journals show concurrence in the amendment.
3. ———: ———: TITLE. The title to a legislative act does not violate constitutional provision that "No bill shall contain more than one subject," because the title contains details as to the manner in which granted powers may be exercised, where such details are all germane to the general subject.
4. ———: ———. Sections 12 and 13, ch. 86, Laws 1933, examined and *held* not to be in conflict with each other.
5. ———: ———. That the powers granted by a legislative act

to public power and irrigation districts to raise revenue may prove inadequate for the needs of the districts is no ground for holding the legislative act invalid.

6. **Eminent Domain.** Chapter 86, Laws 1933, does not authorize public power and irrigation districts to condemn and take private property for public use without just compensation.
7. ———. Chapter 86, Laws 1933, does not authorize the taking of private property for a public purpose without giving the owner thereof his day in court.
8. **Waters:** POWER AND IRRIGATION DISTRICTS. A private property owner may not complain that a public power and irrigation district is without power to function until it has a grant of water rights issued to it by the department of roads and irrigation, since such grant may, if necessary, be subsequently acquired by the district.
9. ———: ———. That a public power and irrigation district may, because of competition, injuriously affect municipally and privately owned and operated electric light and power plants goes only to the wisdom of the legislative act authorizing such districts, and not to its validity.

Original proceeding in *quo warranto. Relator's motion for judgment on pleadings denied, and cause dismissed.*

Perry, Van Pelt & Marti, for relator.

C. N. McElfresh, Mullen, Mullen, Shea & Massey and *August Wagner,* for respondents.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and REDICK, District Judge.

GOOD, J.

This is an action in *quo warranto* and originated in this court.

Relator is a landowner within the corporate limits of the Loup River Public Power District. His land will be affected by the contemplated construction by the district of a hydro-electric power plant and irrigation works. He brings this action against respondents, alleging that they are serving and acting as directors and officers of the corporation without power and authority so to do. Relator bases his claim for relief on the ground that chap-

ter 86, Laws 1933, pursuant to the provisions of which the Loup River Public Power District was organized, is void because violative in many respects of both the state and federal Constitutions. Respondents answered, admitting certain allegations of the petition and denying others, and pleaded new matter which need not be now considered. Thereupon, on motion of relator, the cause was submitted on the pleadings. We can consider only such facts as are admitted by the pleadings.

It is urged that chapter 86, Laws 1933, was not passed by both houses of the legislature, and therefore never became a law. Specifically it is contended that the bill originated in the senate, was passed by that body and sent to the house; that the latter body amended the bill in several respects and returned it to the senate. It is contended that the senate did not concur in all the amendments made by the house, and that the amendments made in the house were an inducement to its passage in that body. A certified copy of the original enrolled bill is in the record. The enrolled bill is signed by the president and secretary of the senate, by the speaker and chief clerk of the house, and approved by the governor. The bill, so certified, imports verity and its passage can only be overthrown by the journals of the house or senate showing affirmatively that the bill was not passed in the manner prescribed by the Constitution.

An examination of the journals of the senate shows that the bill was passed by that body in a proper manner, sent to the house of representatives, and that it was there amended in several respects; that the bill, as amended, was then returned to the senate, and the senate journal shows that the "amendment" was regularly concurred in. It is the contention of relator that, since the bill was amended in several respects, it was necessary that the record should show the *amendments* were concurred in. We are unable to accept this view.

In *Follmer v. State,* 94 Neb. 217, it was held: "The singular number often includes the plural in the construc-

tion of statutes, and generally when the manifest intention of the legislature requires it."

It further appears that, when the house transmitted to the senate the bill, after it had been amended, it purported to carry the several amendments made by the house. An amendment to a statute or a bill may be in more than one particular but still be but one amendment. The legislature has frequently, by a single act, amended a statute in several particulars, and sometimes several sections of an existing statute have been amended by a single legislative act. From the fact that the bill, as certified by the president and secretary of the senate, contains all the amendments that were made by the house, we are convinced that all of the alterations or changes in the bill which were made by the house were concurred in by the senate. The record fails to show that chapter 86, Laws 1933, was not regularly passed by each branch of the legislature.

Relator argues that the title to chapter 86 contains more than one subject, in violation of section 14, art. III of the Constitution. The title to the act is too lengthy to be included in this opinion. It is in part as follows: "An act relating to irrigation, flood control, storage of waters of natural streams, and matters incident thereto, and, either separately or in connection therewith, the generation, distribution, transmission, sale and purchase of electrical energy for lighting, power, heating and other purposes;" and goes on to provide in detail the methods by which the general purpose may be carried out. Relator contends there are 26 different subjects in the bill, but we are of the opinion that all of them are so related as to be a part of one general subject. Generally speaking, it relates to the preservation and utilization, for the public welfare, of one of the natural resources of the state, to wit, the waters of its streams and rivers. This is a broad subject and includes all practical uses and benefits of which such waters are susceptible, not only for irrigation, but canals for transportation, dams for power and

production of electricity for purposes of light and power. The title is probably more of a synopsis of the act than is essential. Because the title to a legislative act details the manner in which granted powers may be exercised does not make it duplicitous when the details are germane to the one general subject.

Relator contends that chapter 86, Laws 1933, is void because sections 12 and 13 thereof are in conflict with each other, and one of said sections nullifies the other. Sections 13 authorizes and directs the board of directors of the district to establish and collect rates and charges for any service rendered or commodity furnished or sold, and that such rates shall be fair, reasonable and non-discriminatory, and further provides: "The governing body of the district shall never lease or alienate the franchises, plant and/or physical equipment of the district to any private person, firm, association or corporation for operating or any other purpose." Section 12 provides: "No power plant, system, or irrigation works owned by the district shall be sold, alienated or mortgaged by the district, except under the following circumstances, to wit: If, in order to borrow money from the federal government or from any loan or finance corporation or agency established under federal law, including the Reconstruction Finance Corporation, or its successor, it shall become necessary that the district mortgage or otherwise hypothecate any or all its said property or assets to secure the payment of a loan or loans made to it by or from such source or sources, the district is hereby authorized and empowered to do so. Nothing in this section contained shall prevent the district from assigning, pledging, or otherwise hypothecating its revenues, incomes, receipts or profits to secure the payment of indebtedness to the federal government."

Relator contends that the provisions of said section 13 deny the power to the district to lease or alienate its franchise, plant or physical equipment, and that section 12 empowers the district to mortgage or hypothecate its

property and assets to secure a loan from the federal government or some of the loan or finance corporations established under federal law; that if such mortgage be given it could only be enforced by foreclosure, which would necessitate a sale of the property, so that it might go into the hands of a private person or corporation.

We think that relator has not properly interpreted said section 13. That section only prevents the leasing or alienating of the franchise, plant or physical property of the district to a private person, firm, association or corporation; while section 12 authorizes the mortgaging of the plant to the federal government or one of its financial agencies. What is sought by section 13 is to prevent the district from surrendering or turning over its property directly to a private individual, firm, association or corporation, and nothing further in that respect; while section 12 specifically authorizes the mortgaging of the plant to the federal government, or one of its financial agencies, which is a public agency and not a private corporation. What would result, in the event the district should mortgage its plant, default in the conditions of the mortgage and a foreclosure follow, and whether the plant could be sold and title given to a private individual or corporation, is a question that is not now before us and presents a contingency that may never arise. In any event, the contingency is so remote that it need not be considered. But, even if the plant and property of the district should go into the hands of a private individual or corporation by virtue of judicial sale, still that would not be prohibited by the act. It is only direct action by the district of leasing or alienating its plant, etc., to a private person, individual, firm or corporation that is prohibited. We think there is no serious conflict between the two sections.

It is further argued that no power or method is provided for requiring the district to establish and collect adequate rates for any commodity it may sell or service it may furnish, and that serious difficulties may arise in

that the district may be unable to collect adequate rates to pay any bonded indebtedness which it may create. These matters may have a tendency to affect the market for any bonds that may be issued and secured by a mortgage upon the plant, but that does not affect the validity of the act. It goes to the wisdom of the legislation. With that the court has no concern. Whether the legislature is wise or unwise; whether the enterprise may be profitable or unprofitable, was a matter for the consideration of the legislature, and evidently the legislature deemed the legislation proper.

It is further contended by relator that chapter 86 is violative of both the federal and state Constitutions, in that it provides for taking of private property without paying just compensation therefor. Again, we are unable to agree with relator. Section 7 of the act confers upon the district the power of eminent domain after the manner provided for in sections 46-602, 46-603, 46-608, and 46-617, Comp. St. 1929. These sections provide for the method of exercise of the power of eminent domain for irrigation purposes, and these sections, in turn, refer to the sections conferring on railroad companies the right to exercise the power of eminent domain and the manner of its exercise.

It is apparent, by reference to the sections referred to, that the property of no person may be taken by the district for public purposes until the amount of damage which he has sustained or will sustain by the taking of his property has been ascertained and paid into the county court. The contention that private property may be taken by the district for public use, without just compensation, seems to be wholly unfounded.

It is further argued that the district has no funds at its command with which to pay for property condemned. That does not render the act unconstitutional. It would be necessary for the district to acquire the funds to pay for property condemned, in the event that it becomes necessary for it to resort to condemnation. This court

is not concerned with the difficulties that the district may encounter in obtaining the funds with which to finance construction of its proposed plant. Since relator and others similarly situated are fully protected in their private property and are assured that it may not be taken from them, except upon payment of just compensation, neither relator nor any one similarly situated has cause to complain.

Relator further contends that there is no provision for him, or for those similarly situated, to have their day in court, if and when condemnation proceedings are instituted. This contention is unfounded. The applicable statute, authorizing the exercise of the power of eminent domain, provides for the filing of a petition in the county court, the appointment of disinterested appraisers, and ten days' notice, in writing, of the time and place of the assessment of damages, and if the owner be dissatisfied with the award he is permitted an appeal to the district court where the cause may be heard before a jury. The statute is apparently not vulnerable to the charge that the property owner is denied due process of law.

Relator also charges that the district is without power to function unless a grant is issued by the department of roads and irrigation, permitting the diversion and use of sufficient water for said purposes. If the district has not yet obtained a grant from the department of roads and irrigation, and if such grant is necessary, that is the concern of the district, but does not, as we view it, concern the relator. If such grant is necessary, there is no reason why the district may not yet procure the grant, but, in any event, that cannot prejudice the relator in his right to the protection of his property.

Chapter 86 is assailed because it permits the district to come into competition with municipally and privately owned and operated electric light and power plants, and, by such competition, may render such privately and municipally owned plants valueless, to the great injury of the owners. This goes only to the wisdom of the legis-

lation, and not to its validity. That was a matter solely for the legislature to determine. Its action in that respect is not subject to review by this court.

From a consideration of the entire record, we conclude that relator is not entitled to the relief demanded.

Relator's motion for judgment in his favor on the pleadings is denied and the cause dismissed at relator's cost.

DISMISSED.

KITCHEN BROS. HOTEL COMPANY, APPELLEE, V. OMAHA SAFE DEPOSIT COMPANY, TRUSTEE, APPELLEE: CONTINENTAL LIFE INSURANCE COMPANY, INTERVENER, APPELLANT.

FILED APRIL 14, 1934. No. 28865.

1. **Parties: INTERVENTION.** Section 20-328, Comp. St. 1929, permitting intervention before trial as a matter of right, does not prevent a court of equity, in the exercise of its discretion and in the furtherance of justice, from allowing intervention after judgment to protect inherent rights in the foreclosure of a real estate mortgage.
2. **Mortgages: FORECLOSURE.** A mortgage indenture which prohibits the holder of any bond or coupon from instituting any suit, action or proceeding in equity or law, or the execution of any trust thereunder, or for any other remedy, unless written notice is given the trustee or unless the holders of one-fourth of the bonds and coupons shall have made request of the trustee and given it reasonable opportunity to exercise its power thereunder, is not a limitation upon the inherent rights of such bondholders to protect their interests in the foreclosure of the mortgage indenture.
3. ———: ———: **SALE.** A mortgage indenture which provides that, upon foreclosure, "the trustee, as such trustee, for the benefit of the holders of the bonds and coupons then outstanding and unpaid without any further authority or direction from such holders, may bid at such sale and become the purchaser of the property and take and hold the title thereto for the benefit of the holders of the outstanding bonds and coupons, and the trustee shall then have full power and authority to manage,

operate and control such property and to resell the same at such price and on such terms as it deems for the best interest of the bondholders," is valid, inures equally to the benefit of all the bondholders, and is binding upon them.

4. ———: ———: DECREE. A decree in foreclosure of such mortgage indenture permitting the trustee, as such, to bid for and buy the property at foreclosure sale for a sum sufficient to pay the full amount of the indebtedness, with interest and costs, or for any less amount for the *pro rata* benefit of all the bondholders, and that the trustee as such shall be entitled to receipt to the sheriff, which receipt shall be accepted by the sheriff for the full amount of its bid as trustee of the bondholders without liability for payment of cash on account of such bid and without liability to account for or to distribute cash to any bondholders on account of such bid and without the production of any bonds, is not in violation of the provisions of the mortgage indenture and is legal, equitable and enforceable, the court having retained jurisdiction for the giving of such further orders as may be necessary or proper for the benefit and protection of all the parties in interest.

5. ———: ———: SALE. If the property is purchased by the trustee, as such, at such foreclosure sale for the benefit of all the bondholders, any sale of the property thereafter must first be approved by the equity court, thereby protecting the bondholders.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Charles G. Revelle and *Courtney S. Goodman,* for appellant.

Fradenburg, Stalmaster & Beber, Charles Battelle and *Kenneth S. Finlayson, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CARTER and CHAPPELL, District Judges.

CHAPPELL, District Judge.

A suit was commenced by the Kitchen Bros. Hotel Company against the Omaha Safe Deposit Company of Omaha, theretofore appointed by the district court for Douglas county, Nebraska, as successor trustee to the Fidelity Bank & Trust Company, insolvent and in the hands of a

receiver, the object and prayer of which was to obtain a decree, *inter alia,* that certain payments which had been made upon a mortgage be declared legal payments and enjoining the successor trustee from declaring a default and foreclosing a mortgage. While this case was pending a default in subsequent payments upon the mortgage was made by the mortgagor, Kitchen Bros. Hotel Company. The defendant Omaha Safe Deposit Company of Omaha, as successor trustee under the mortgage, then filed its answer and cross-petition to foreclose the mortgage. On January 30, 1933, a final decree of foreclosure was entered by the court. On February 3, 1933, after the decree had been entered, the appellant, Continental Life Insurance Company, claiming to own some of the bonds secured by the mortgage, obtained an *ex parte* order permitting it to intervene and file instanter a motion to modify the decree. The motion was overruled upon hearing February 18, 1933, and this appeal perfected by the Continental Life Insurance Company.

The motion of appellant to modify the decree alleged that it was the owner of $118,000 of the first mortgage bonds of Kitchen Bros. Hotel Company, and that the decree of foreclosure, under date of January 30, 1933, was unlawful, invalid, and in direct violation of section 4, article V of the mortgage indenture, in that it provides: "(6) That the Omaha Safe Deposit Company as successor trustee herein may bid for and purchase said mortgaged property for a sum sufficient to pay the full amount of the said indebtedness hereinbefore found due it as trustee aforesaid, with interest thereon and costs of suit as aforesaid, or for any less amount, all for equal *pro rata* benefit of the holders and owners of the first mortgage series 'A' gold bonds and interest coupons and the series 'B' gold note subject to the respective priorities existing between the said first mortgage series 'A' gold bonds and the said series 'B' gold note. (7) That in the event that said cross-petitioner as successor trustee herein shall, under the power hereby conferred, bid for and

purchase the said mortgaged property, it shall be entitled to receipt to the sheriff of Douglas county, Nebraska, for the full payment of its bid as trustee of the holders and owners of the first mortgage series 'A' gold bonds and interest coupons and series 'B' gold note secured by said mortgage indenture and chattel mortgage for each and all of them, without liability for payment of cash on account of such bid and without liability to account for or to distribute cash to any bondholders on account of such bid. (8) That in the event that the said Omaha Safe Deposit Company, as successor trustee, cross-petitioner herein, shall, under the power hereby conferred, bid for and purchase the said mortgaged property, that it may do so without the production of any of the first mortgage series 'A' gold bonds or interest coupons thereto attached and/or series 'B' gold note described in said mortgage indenture and chattel mortgage and the receipt of the trustee as hereinbefore set forth shall be accepted by the sheriff of Douglas county, Nebraska, as the equivalent of cash in the amount thereof."

Section 4, article V of the mortgage indenture in controversy, provides: "In event of sale of the mortgaged property under a decree of foreclosure, any bondholder, or bondholders or committee of bondholders or the trustee, may bid for and purchase such property and shall be entitled for the purposes of making settlement or payment of the bid to use and apply any bond and any matured and unpaid coupons or moneys due them under this mortgage by presenting such bonds and coupons in order that they may be credited thereon the sum apportionable and applicable thereto out of the net proceeds of such sale and thereupon such purchaser shall be credited on account of the purchase price payable by him with such sums apportionable and applicable out of the net proceeds to the payment of or as a credit on the bonds and coupons so presented. The trustee, as such trustee, for the benefit of the holders of the bonds and coupons then outstanding and unpaid without any further authority or direction

from such holders, may bid at such sale and become the purchaser of the property and take and hold the title thereto for the benefit of the holders of the outstanding bonds and coupons, and the trustee shall then have full power and authority to manage, operate and control such property and to resell the same at such price and on such terms as it deems for the best interest of the bondholders. * * * The proceeds of such a sale shall be held by the trustee and distributed as provided in article VI of this indenture."

We meet the contention, made for the first time in this court, that parties cannot come into a case by intervention after judgment. Section 20-328, Comp. St. 1929, provides: "Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the state of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences." We have passed directly upon this matter in several cases. "In the first place the contention of the appellee that a statutory petition in intervention must be filed before trial must be conceded. But there are two kinds of intervention—that provided by section 7609, Rev. St. 1913 (now section 20-328, Comp. St. 1929) which, we have decided in common with the courts of other states having like provisions, is a matter of right, and which requires no leave to be granted by the court. In such a case the intervener can only file as a matter of right before the trial. * * * The other kind of intervention is that which prevailed in this state before the enactment of the statute mentioned, and which, while not an ancient procedure in courts of equity (note at page 281, 123 Am.

St. Rep.), has been adopted by many courts as essentially equitable in its nature, and which may be allowed by a court of equity in its discretion in a proper case." *State v. Farmers State Bank,* 103 Neb. 194.

"It is first argued that a petition to intervene must be filed before trial, that the right of intervention terminates with the final decree, and that the trial court erred in overruling the motion to strike intervener's pleadings from the record. In this connection reference is made to the statutory right of intervention before trial. Comp. St. 1922, sec. 8552 (now Comp. St. 1929, sec. 20-328). Intervention under this statute is a matter of right, but does not prevent a court of equity in the interests of justice from allowing a proper party to intervene after the trial has begun. *State v. Farmers State Bank,* 103 Neb. 194. Was intervention properly allowed 17 days after entry of the unexecuted decree of foreclosure? Leave to intervene after the entry of a final decree is not allowable as a matter of right and should seldom be granted, but equity sometimes requires a departure from the general rule. In the light of both reason and precedent it has been said: 'Applications for leave to intervene after entry of a final decree are unusual, and generally have been denied. There are instances, however, where petitions for leave to intervene have been filed and granted after decree.' 21 C. J. 345." *Engdahl v. Laverty,* 110 Neb. 672. See, also, 21 C. J. 341-343, 345, and notes; *Brown v. Brown,* 71 Neb. 200; *Ward v. Clark,* 6 Wis. *509; *Webb v. Patterson,* 114 Neb. 346.

If the allegations of the motion to modify the decree were true, the decree obtained by intervener's trustee was unlawful, invalid and in violation of the contract made by the *cestui que trust* with its trustee who supposedly represented it in this litigation. The decree in this case was not yet executed. The application to intervene was made within four days after the decree was signed and filed and during the same term of court. No question as to the right to intervene is involved except as to the

time thereof. The equity court certainly had the power at this time to modify its directions inserted in the judgment commanding the parties to do particular things for the purpose of carrying the judgment into effect which do not relate to the merits of the controversy. Paragraph 13 of the decree retains jurisdiction for just such purposes. Except when the right to intervene is considered absolute, the grant of the right is within the sound discretion of the court and will be liberally exercised in favor of intervention. Under the circumstances we believe the court properly permitted appellant to intervene and file the motion to modify the decree. *Straus v. Chicago Title & Trust Co.*, 273 Ill. App. 63; *Farmers Loan & Trust Co. v. Northern P. R. Co.*, 66 Fed. 169; *Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co.*, 200 Fed. 600; *Howard v. Shinn*, 190 Fed. 940; *Wightman v. Evanston Yaryan Co.*, 217 Ill. 371; *Columbia Knickerbocker Trust Co. v. Ithaca Street R. Co.*, 141 N. Y. Supp. 249; *Sage v. Central R. Co.*, 99 U. S. 334; *Webb v. Patterson, supra.*

Appellee contends that section 6, article V of the mortgage indenture, prohibits the holder of any bond or coupon from instituting any suit, action or proceeding in equity or law for the foreclosure of the mortgage or the execution of any trust thereunder, or for any other remedy, unless written notice is given the trustee or unless the holders of one-fourth of the bonds and coupons shall have made request of the trustee and give it reasonable opportunity to exercise its power thereunder; that by virtue of this provision appellant cannot maintain intervention. We must hold that this provision is not a limitation upon the inherent rights of bondholders to protect their interests under the circumstances. *Hoyt v. Du Pont de Nemours Powder Co.*, 88 N. J. Eq. 196; *Columbia Knickerbocker Trust Co. v. Ithaca Street R. Co., supra.*

We come now to the main question in the case; that is, whether paragraphs 6, 7, and 8 of the decree are in direct violation of section 4, article V of the mortgage in-

denture, in direct contravention with the terms and provisions of the mortgage indenture as a whole and not warranted or authorized by any of the terms of the mortgage indenture, and whether such provisions of the decree are valid. A careful reading of the mortgage indenture as a whole, the decree of the court and many eminent authorities convinces us that such provisions are in conformity to and with the provisions of the mortgage indenture, for the benefit of and protection for all the bondholders, and legal and binding in every respect upon all the parties thereto.

This agreement, the mortgage indenture, was made in the first instance to secure the common interests of all the bondholders in such a manner that none should obtain an advantage over the others. It was agreed by the mortgage indenture that, upon foreclosure, purchase might be made by the trustee on account of all the bondholders and that subsequent disposition of the property should be for the common benefit of all of them. It will be noted that the decree in paragraphs 11, 12, and 13 provides the manner of distribution upon sale, for deficiency, and retains jurisdiction by the equity court to give such further orders as may be necessary or proper for the benefit and protection of all the parties in interest.

It will be noted that *Equitable Trust Co. v. United States Oil & Refining Co.*, 35 Fed. (2d) 508, and *Werner, Harris & Buck v. Equitable Trust Co.*, 35 Fed. (2d) 513, relied upon by appellant, are not in point here, for the reason that in both cases there was no provision in the trust deed authorizing the trustee to bid for and on behalf of the bondholders. Further, in both of these cases the orders made by the court were *ex parte*. We call attention to *Hoffman v. First Bond & Mortgage Co., Inc.*, 116 Conn. 320, *Nay Aug Lumber Co. v. Scranton Trust Co.*, 240 Pa. St. 500, and *First Nat. Bank v. Neil*, 137 Kan. 436, which all hold that the trustee has a right to purchase for the benefit of bondholders at a foreclosure sale

upon order of the equity court although the trust deed did not contain any express provision authorizing it.

Appellant contends that the rights and interests of the successor trustee, as given by the foreclosure decree, are antagonistic and hostile to and in conflict with the rights and interests of minority bondholders. A careful reading of the decree discloses that the successor trustee is permitted to bid as successor trustee for the benefit of all the holders and owners of series "A" bonds and series "B" gold note, and not in his individual capacity for his own benefit or profit. The right of the trustee to bid as an individual for its own benefit and profit is not in controversy. The question is confined solely to its power to bid as successor trustee for the benefit of all the bondholders, and not on its own individual account for its own benefit or profit. Bearing this in mind, *Missouri Valley Trust Co. v. Nelson*, 104 Neb. 499, *Stettnische v. Lamb*, 18 Neb. 619, and 2 Perry, Trusts and Trustees (7th ed.) 1293, sec. 749, relied upon by appellant, are not in point.

We arrive at a construction of section 4, article V of the mortgage indenture, by reading the whole of the instrument. It seems to us without question that there are three ways in which sale of the property could be made: (1) For cash, which follows as a matter of course; (2) to a bondholder or a committee of bondholders with *pro rata* payment made in bonds or money; (3) purchase by the successor trustee as such for all the bondholders without the production of either bonds or money. Section 4, article V, does not require that the successor trustee pay the amount of the bid in cash or deliver bonds which would be immediately returnable to it. *Silver v. Wickfield Farms*, 209 Ia. 856; *Beal v. Blair*, 33 Ia. 318; *Quaintance v. Mahaska County State Bank*, 201 Ia. 457; *MacLaglan & Pierce v. Witte*, 1 Neb. (Unof.) 438; *Lockwood v. Cook*, 58 Neb. 302. The logics of equity cannot be so marshaled under these circumstances as to require this impossible and meaningless procedure. Appellant cites no precedent and we find none for it.

Having concluded that the mortgage indenture makes provision for the procedure provided for in the decree, we turn to the question of its legality. We find that great adventures in the field of business and finance have brought to the courts of last resort a new field of inquiry upon this subject. While there is a diversity of opinion, the great weight of authority undoubtedly establishes the legality of such procedure. *Straus v. Chicago Title & Trust Co., supra,* is the latest case we have been able to find. It disposes of every question raised in this case and is supported by eminent authority. In this well-reasoned case, the court said: "It is a universal rule of law that a trustee is in duty bound to see that the property entrusted to his care is not lost to the beneficiaries. Courts will take judicial notice that property sold under foreclosure seldom, if ever, brings a figure at all commensurate with its value, and that under the present financial condition of the country there is great depreciation in the values of real estate, and that a foreclosure sale of property will bring far less now than in normal times. *Atchison, T. & S. F. R. Co. v. United States,* 284 U. S. 248; *Morris Plan Bank of Richmond v. Henderson,* 57 Fed. (2d) 327. In these circumstances we think the property in question ought not to be sold at a price which will result in great loss to the bondholders, if this can be avoided by having the property bid in for the amount of the indebtedness, by the trustee, for their use and benefit. Of course, it may be said that any sale made by the master must first be approved by the court before it is binding and in this way the bondholders are protected. * * * Under these provisions we think the trustee may foreclose the trust deed, purchase the property at the sale for the benefit of the bondholder, and apply the amount due on the bonds, as found by the decree, in payment of his bid without the production of the bonds, all of which, of course, will be subject to the approval of the chancellor, who will protect the rights of each and every bondholder. *Hoffman v. First Bond & Mortgage*

Co., Inc., 116 Conn. 320; *Nay Aug Lumber Co. v. Scranton Trust Co.*, 240 Pa. St. 500; *First Nat. Bank v. Neil*, 137 Kan. 436; *Silver v. Wickfield Farms*, 209 Ia. 856; *Sturges and Douglass v. Knapp*, 31 Vt. 1; *Werner, Harris & Buck v. Equitable Trust Co.*, 35 Fed. (2d) 513."

" 'Trustees, in carrying the trust into execution, are not confined to the very letter of the provisions. They have authority to adopt measures and to do acts which, though not specified in the instrument, are implied in its general directions, and are reasonable and proper means for making them effectual. This implied discretion in the choice of measures and acts is subject to the control of a court of equity, and must be exercised in a reasonable manner.' 3 Pomeroy's Equity Jurisprudence (4th ed.) p. 2428. * * * It is one of the most important and essential powers of a court of equity to raise the implications growing out of the state of trust property, the purposes to be accomplished and the mode adapted to that end, without violence to or forced construction of the trust instrument. *Sturges and Douglass v. Knapp*, 31 Vt. 1, 52." *Hoffman v. First Bond & Mortgage Co., Inc.*, 116 Conn. 320. The court also said: "The trustee was the constituted representative and protector of noteholders who are numerous, widely scattered, and unorganized, and therefore impotent to effectively protect their own interests from sacrifice at a forced sale, precipitated by a third party, in a demoralized market. When default of payment of the mortgage debt occurred and until foreclosure was consummated, the trust was active and the trustee's duties correspondingly so. 'It not only is not a dead, dry trust, but is one of the most active and momentous responsibility.' *Sturges and Douglass v. Knapp, supra*, p. 55. * * * It would be absurd to regard the trustee's duty as terminated at the very time when its protection was most needed. If it had stood by and permitted the property to be sold for a fraction of its value, the trustee might have been exposed to the charge of 'supine negligence or wilful default' which was sustained in *Watson v. Scranton*

Trust Co., 240 Pa. St. 507. * * * In an emergency a court of equity may, for the preservation of the trust and the protection of the beneficiaries from loss, even authorize a trustee to depart from the terms of the trust agreement. * * * Considerations similar to those which justify the right to bid in at the foreclosure sale dictate that the trustee hold and administer the property acquired thereby until such time as it can be disposed of without unnecessary sacrifice and loss to the noteholders. This right and duty would seem to be a necessary corollary and consequence of the right to bid and buy." See, also, *New Jersey Nat. Bank & Trust Co. v. Lincoln Mortgage & Title Guaranty Co.*, 105 N. J. Eq. 557; *Marsh v. Reed*, 184 Ill. 263; *In re New*, L. R. (1901) 2 Ch. Div. 534; 2 Perry, Trusts and Trustees (7th ed.) sec. 764; 2 Beach, Trusts and Trustees, secs. 428, 429, 430; 3 Thompson, Corporations (2d ed.) sec. 2678; 3 Cook, Corporations (6th ed.) sec. 885; *Etna Coal & Iron Co. v. Marting Iron & Steel Co.*, 127 Fed. 32; *Sage v. Central R. Co.*, 99 U. S. 334. In *New Jersey Nat. Bank & Trust Co. v. Lincoln Mortgage & Title Guaranty Co., supra*, it was held that the "great and widespread depression in real estate in New Jersey and elsewhere, resulting in an excessively abnormal number of purchases * * * at foreclosure sales, and inability to dispose of such properties without great losses" constituted such an emergency; that "the real estate values are actually existent; it is the market which is temporarily lacking, and which will eventually return."

While the court has in mind that there is danger of further loss in some instances by following this procedure, it cannot overlook the fact that in these times a large portion of the bondholders, being unable to bid by reason of lack of financial resources, would be at the mercy of those bondholders and others who are fortunate enough to have financial ability to bid who would thus be able to purchase the property at such sale for a fraction of its ordinary value, thereby enriching themselves, and depriving the small helpless investors of their just and legal

rights. America has always survived these financial crises and recovered her economical equilibrium within a reasonable time. We believe it will do so again, and that bondholders, by virtue of this precedent, will be able eventually to recover such loss as would be otherwise inevitable. This court takes cognizance that the whole proceeding henceforth shall continue to be under the watchful supervision and control of a just and fearless court of chancery and that any sale of such property by the successor trustee, if purchased by it for the bondholders, cannot be made without its consent and approval; that in the meantime the property will be managed, operated and controlled by the successor trustee under its supervision.

The judgment of the district court is right, and it is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. CITIZENS STATE BANK OF WAHOO, E. H. LUIKART, RECEIVER, APPELLANT: OLOF PEARSON, ADMINISTRATOR, INTERVENER, APPELLEE.

FILED APRIL 20, 1934. No. 28811.

1. **Banks and Banking**: INSOLVENCY: TRUST FUNDS. This case is ruled by the principles declared by a majority of this court in *State v. Farmers State Bank*, 121 Neb. 532, viz.: "Where a state bank as trustee unlawfully converts and sells the trust property, deposits the proceeds to its own credit without authority, mingles indistinguishably the trust proceeds with the general mass of bank assets which are thus augmented, uses the trust fund in the regular course of the banking business, fails to execute the trust or to return the trust fund to the beneficial owner, and goes into the hands of a receiver, the beneficiary of the trust may resort to equity, charge the mass, and restore the trust fund as a preferred claim payable in full from the general assets, if sufficient."
2. **Executors and Administrators**: ESTOPPEL. Acts performed merely and exclusively as an individual cannot operate as an estoppel against an administrator *de bonis non* in his representative capacity

APPEAL from the district court for Saunders county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

F. C. Radke, Barlow Nye, J. J. Thomas, Joe F. Berggren and *G. E. Price,* for appellant.

Hendricks & Kokjer and *Good, Good & Kirkpatrick, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ.

EBERLY, J.

This is a proceeding in intervention in the receivership of the Citizens State Bank of Wahoo, Nebraska. The intervener is Olof Pearson, the duly appointed administrator *de bonis non* of the estate of John Hultstedt, deceased, who herein seeks to establish a claim in the nature of a trust fund against the assets of this bank in the hands of E. H. Luikart, receiver, in the sum of $11,650. This claim was allowed by the trial court as a trust fund to the extent of $7,050, and disallowed as to the balance. From this final order the receiver prosecutes this appeal, and the intervener by way of cross-appeal complains of the partial disallowance of his claim as a trust fund.

Sifting the facts from the record, so far as may be material to the controlling questions now before this court, we are limited to the following: It appears that during the course of events hereinafter narrated one Emil Benson occupied the position of cashier or vice-president of the Citizens State Bank of Wahoo, was one of the executives thereof, and its actual managing officer. While occupying this position, on July 2, 1923, he was, by the county court of Saunders county, appointed guardian of the estate of John Hultstedt, an incompetent. He qualified as such, and in that capacity took over and received possession of a homestead in the city of Wahoo, valued at $3,000; "cash on hand" amounting to $7,740.49 in the Citizens State Bank of Wahoo; certificates of deposit issued by this institution in favor of John Hultstedt in the

sum of $6,398.21; and a note given by one Pete Pearson and wife to such John Hultstedt in the sum of $13,000, which was secured by a first mortgage on real estate. Emil Benson served as such guardian until the death of his ward, which occurred July 1, 1927. On August 4, 1927, he was appointed and qualified as "administrator of the estate of John Hultstedt, deceased." Meanwhile the mortgage and note of $13,000 by their terms matured on February 29, 1924, and were in effect renewed by Pete Pearson and his wife executing and delivering three separate notes secured by three mortgages, which severally covered different portions of the identical real estate which had formerly been covered by the one mortgage of $13,000. These notes were for the sums of $3,000, $5,000 and $5,000 respectively. The payee named in each of these renewal notes and the grantee named in each of the renewal mortgages securing the same was the Citizens State Bank. The bank, however, contributed no cash at the time of this transaction. On the execution of these renewals the original $13,000 mortgage was released by Emil Benson, "as guardian of John Hultstedt." It appears that later, without direction or approval of the county court of Saunders county, the $3,000 note and mortgage were sold by the Citizens State Bank to George Beadle, and a cashier's check in that amount was issued to Emil Benson as guardian of John Hultstedt. On August 21, 1924, the Citizens State Bank entered on its books as assets owned by it the two notes of $5,000 each and the mortgages securing the same, and on that date credited to the guardianship account of Emil Benson the sum of $13,000. The bank subsequently sold the two $5,000 mortgages for their full value, and received their full value. We infer that this transaction was intentionally concealed from the county court, because Emil Benson in his subsequent reports, as well as his final report, as guardian, continued to list these mortgages as assets of the estate in his possession, and also inventoried them as property on hand after his appointment and qualification as administrator of the

estate in 1928. It also may be inferred that the bank paid interest on the $13,000 for a period of four years, in the sum of $2,600. It also appears that in March, 1924, one Bruce was indebted to the Citizens State Bank in the sum of approximately $16,000. Bruce was then the owner of 110 acres of encumbered land situated in Lancaster county, Nebraska, and all the notes representing Bruce's indebtedness were then about one year overdue. A settlement of this was made by and between Bruce and the bank on the following terms: Bruce and wife by warranty deed, dated March 4, 1924, in consideration of one dollar and settlement and adjustment of notes, conveyed to the Citizens State Bank of Wahoo 60 acres of his 110-acre farm. This warranty deed was recorded on September 5, 1924, and contained the warranty that the premises conveyed "are free from encumbrance." Bruce also executed and delivered to the Citizens State Bank a note of $9,000 secured by a first mortgage on the 50-acre farm retained by him. At the time of this transaction and just prior to its completion there was a first mortgage on the entire 110-acre farm of $15,200, on which past-due interest in the sum of $425 had accrued, making a total of $15,625. $7,000 of the $9,000 note represented Bruce's share of the amount of this first mortgage on the 110-acre farm properly allocated to the 50 acres, the title to which he retained. Interest amounting to $425 had accrued on his notes payable to the bank; $389 defrayed miscellaneous expenses occasioned by the transaction; and he was credited on the books of the Citizens State Bank with the balance of $1,192.20, which he subsequently "checked out." This transaction occurred on March 4, 1924, and on this day or the day following the Citizens State Bank of Wahoo actually issued its draft of $15,625, drawn on its correspondent bank in Omaha, in payment of the balance then due on the mortgage on the 110-acre farm. This mortgage note, thus paid, by its terms was payable at the Lincoln Safe Deposit Company of Lincoln, Nebraska, and was paid to the City National

Bank of Lincoln, Nebraska. That the entire transaction had been previously arranged and planned by the officers of the Citizens State Bank of Wahoo may be inferred from the fact that the release of mortgage which was received by this institution thus making this payment is both dated and acknowledged by the mortgagees on March 1, 1924. It also appears from a carbon copy of a letter introduced in evidence bearing date of March 3, 1924. It further appears that while this exchange thus issued by the Citizens State Bank was actually issued on the 4th or 5th of March, 1924, and paid by the drawee thereof on the 8th of March of that year, the entry of this draft on the draft register of the Citizens State Bank now appears under date of March 7, 1924, but it was not otherwise credited to its correspondent on its own books until August 21, 1924. The surrounding circumstances lend color to the view that the controlling motive involved in this transaction on the part of the officers of this bank was a desire to conceal the true condition of their institution. It will be noted that, notwithstanding the Citizens State Bank failed to record the facts in its records, the transaction with Bruce was a closed transaction not later than March 8, 1924. The rights of all parties to it were on that date fixed, and neither the John Hultstedt estate nor the guardian thereof had up to that time any connection with the same.

However, the Citizens State Bank of Wahoo was in a precarious condition. Its books were not in balance, and it is quite apparent that for reasons of their own its officers desired to avoid disclosing the fact of its ownership of the 60-acre farm as an addition to "other real estate," then carried on the books of this bank. It is obvious that the situation of this bank was one of danger and could not be continued indefinitely. The facts in the record sustain the conclusion that Benson, with the evident intent of aiding his bank, on August 21, 1924, without previous authorization of the county court of Saunders county, caused the sum of $15,625 to be charged out of

his account as guardian and a credit of that amount to be made on the books of his bank in the account of the First National Bank of Omaha, which was its correspondent bank. At the termination of the last transaction, it will be noted the bank owned the 60-acre farm; was receiving the rentals thereof; and that $15,625 had disappeared from its ostensible deposits and it had secured credit for that identical amount on its own books in the account of its correspondent bank. This continued almost four years, and then John Hultstedt, the incompetent, died. His death brought home to these delinquents that a settlement day was at hand, and at least a certain amount of the guardianship funds, which had been swallowed up by the bank, would have to be paid over. We are justified in the opinion that these bankers concluded it was highly desirable that money should be borrowed on the 60-acre farm, rather than to increase their bills payable or their rediscounts, if indeed in their then situation either of the latter methods was practicable. We deem it fairly established by the facts of the record that, for the purpose of securing money by negotiating a loan thereon for the benefit of the bank, the Citizens State Bank of Wahoo, by warranty deed on October 23, 1928, conveyed the 60-acre farm, hereinbefore referred to, to Emil Benson, its cashier and then managing officer. A real estate loan of $6,000 was secured on this land by Benson for the bank *(Lincoln Joint Stock Land Bank v. Bexten,* 125 Neb. 310). The proceeds thereof, less $25, the necessary expenses, were thereafter received by Benson who had been duly appointed administrator of his deceased ward, and in that capacity he lawfully made the expenditures that the changed circumstances due to the death of John Hultstedt required. Still later on April 23, 1930, Emil Benson, by deed of general warranty which was not signed or acknowledged by his wife, conveyed the 60-acre farm in question to "Olof Pearson as Trustee for the John Hultstedt heirs." Certain legal proceedings followed relating to the foreclosure of the $6,000 mortgage negotiated by

Emil Benson, wherein Olof Pearson appeared exclusively in his capacity as such trustee, and the result was the foreclosure sale of the mortgaged property for an amount which was sufficient only to satisfy the foreclosure decree, and from which no moneys were derived by either Pearson as trustee, or by those he assumed to represent in that capacity. His appointment to this trusteeship was without any lawful authority, judicial or otherwise, and his acts were those of a mere volunteer prompted by good motives.

In view of the controlling facts set forth, we are of the opinion that results attained by the decree of the trial court appealed from are in all respects supported by, and consistent with, the views of the majority of this court, as expressed by them in *State v. Farmers State Bank,* 121 Neb. 532, viz.:

"Where a state bank as trustee unlawfully converts and sells the trust property, deposits the proceeds to its own credit without authority, mingles indistinguishably the trust proceeds with the general mass of bank assets which are thus augmented, uses the trust fund in the regular course of the banking business, fails to execute the trust or to return the trust fund to the beneficial owner, and goes into the hands of a receiver, the beneficiary of the trust may resort to equity, charge the mass, and restore the trust fund as a preferred claim payable in full from the general assets, if sufficient."

See, also, *State v. Farmers State Bank,* 121 Neb. 547; *State v. Farmers State Bank,* 121 Neb. 580; *State v. State Bank of Touhy,* 122 Neb. 582; *State v. Citizens State Bank,* 124 Neb. 562; *State v. Farmers & Merchants State Bank,* 125 Neb. 437.

Though not discussed in this opinion, the cases cited by appellant, at variance with the rule above quoted, have been given due consideration. The views of the minority of this court in this connection are set forth in the dissenting opinions appearing in *State v. Farmers State*

Bank, 121 Neb. 532, 541, and in *State v. Farmers State Bank,* 121 Neb. 547.

It is certain that Emil Benson as and while the qualified and acting guardian of Hultstedt, an incompetent, and at the same time being the cashier and the managing officer of the Citizens State Bank, without authorization by any court of competent jurisdiction previously obtained, by his positive fraud designedly and unlawfully so conducted the affairs of his ward's estate that his bank by a series of unlawful steps secured, obtained, and took over, first the renewals of a $13,000 real estate loan, originally the property of John Hultstedt; then later by the joint acts of this bank and this guardian there was credited in his checking account the sum of $13,000 as a deposit made as and when the renewals of this mortgage were sold by this bank; and still later, on August 21, 1924, wholly without consideration and solely for the benefit of the bank, the sum of $15,625 was charged out of this account by Emil Benson as guardian, and by Emil Benson as managing officer of the bank, and a like sum entered in its books as a credit to the First National Bank of Omaha, its correspondent bank. Of each of these fraudulent steps the Citizens State Bank of Wahoo had actual notice. In addition, it aided and abetted in the fraud as committed.

"Where one person obtains property of another by theft or fraud, equity will raise a constructive trust in favor of the defrauded party, and he may follow the property into the hands of third persons taking it with knowledge." *Logan v. Aabel,* 90 Neb. 754.

The frauds committed involved no passing of money or physical assets out of the institution, but the property of the estate was in effect swallowed up by the institution, increased and swelled its assets, and save and except the sums returned as heretofore set forth it still retains the same, though, it may be said, not identified with or traced to any particular asset now in the receiver's hands.

It is obvious that the receiver is entitled to a credit on this claim for the following: First, for the sum of $5,975, being the net proceeds of the real estate loan; and, second, the sum of $2,600, being interest payments actually made by the bank. This leaves a balance due on this claim of $7,050, with interest, as determined by the trial court.

We have not overlooked appellant's contention as to the claimed estoppel based on the conveyance of the 60-acre farm to Olof Pearson "as trustee," and the proceedings taken by him in that capacity in connection with the foreclosure of the mortgage thereon. It appears that the action taken by Pearson, so far as related to this land, was that of a volunteer, and wholly without authority from those whom he purported to represent. Indeed, one of them was admittedly an incompetent.

The rule appears to be that no unauthorized individual transaction of an administrator *de bonis non* can estop his recovery in his official capacity. *Arlington State Bank v. Paulsen*, 59 Neb. 94; *Edney v. Baum*, 70 Neb. 159; *Coe v. Nebraska Building & Investment Co.*, 110 Neb. 322; 32 C. J. 744; 23 C. J. 1178.

We have carefully considered the other questions presented by the appellant, as well as those set forth in appellee's cross-appeal, but find the decision of the trial court in all respects substantially correct.

As required by the terms of the rule declared by the majority of this court in the controlling decisions cited, the judgment of the district court is, in all respects,

AFFIRMED.

METROPOLITAN DINING ROOM, APPELLEE, V. CLAUSINE JENSEN, APPELLANT.

FILED APRIL 20, 1934. No. 29115.

1. **Master and Servant**: WORKMEN'S COMPENSATION LAW: AWARD. An award of compensation for permanent disability made by order of the district court under the provisions of the employers' liability act is final except that it may be modified upon the application of either party to that court any time after six months on the ground of decrease or increase of disability due solely to the injury resulting from the accident.
2. ———: ———: ———: MODIFICATION. In a suit to modify an award for permanent total disability because of increase or decrease of incapacity due solely to injury, the same procedure shall be followed as provided in cases of dispute except that, after district court has entered order, the application shall be made to that court.
3. ———: ———: ———: APPEAL. Compensation case appealed from the district court will be tried in the supreme court *de novo* upon the record.
4. **Appeal.** "Trial *de novo*" in the supreme court means that the case will be tried on the same pleadings and evidence on which it was tried in district court.
5. **Master and Servant**: WORKMEN'S COMPENSATION LAW: AWARD: MODIFICATION. Mistake is not a ground provided by Nebraska workmen's compensation statutes to modify a final award of compensation.
6. ———: ———: BURDEN OF PROOF. In compensation cases the employee has the burden to establish that his disability was caused by accident arising out of and in the course of his employment.
7. ———: ———: ———. Upon an application to modify an award under the workmen's compensation statutes, the burden of proof rests upon the petitioner to establish by a preponderance of the evidence that the disability has increased, decreased or terminated as alleged.
8. **Evidence** examined and *held* sufficient to justify a decree vacating award of compensation.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Dorsey & Baldrige, for appellant.

Dressler & Neely, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and REDICK, District Judge.

DAY, J.

In 1924, Clausine Jensen, an employee of the Metropolitan Dining Room in Omaha, was injured and was awarded compensation by the district court for Douglas county, under the provisions of the workmen's compensation act, for permanent total disability, the sum of $10.67 a week for 300 weeks and $7.20 a week thereafter for the remainder of her life or until disability shall end. This suit was brought by the employer, in 1932, to modify the award on the ground that the disability due solely to the injury no longer exists. The employer alleged that Mrs. Jensen was no longer disabled as a result of the accident, while Mrs. Jensen denied the allegation and asked that back payments, plus interest and statutory penalty, be decreed. The trial court entered a judgment that the employer and the insurance carrier be relieved of further liability.

An award of compensation for permanent disability made by order of the district court under the provisions of the employers' liability act is final except that it may be modified upon the application of either party to that court any time after six months on the ground of decrease or increase of disability due solely to the injury resulting from the accident. Comp. St. 1929, sec. 48-142; *Updike Grain Co. v. Swanson*, 103 Neb. 872.

In a suit to modify an award for permanent total disability because of increase or decrease of incapacity due solely to injury, the same procedure shall be followed as provided in cases of dispute except that, after district court has entered order, the application shall be made to that court. Comp. St. 1929, sec. 48-142.

Most of the compensation statutes provide for a modification of an award upon the ground that it should be increased or decreased if the disability has changed or upon the ground of mistake. 2 Schneider, Workmen's Compensation Law (2d ed.) sec. 552.

In this case, the judgment awarding compensation is final and cannot be modified or vacated except as provided either by the compensation statutes or statutes relating to civil procedure. In fine, all matters are excluded from the consideration of the court upon an application to modify the decree except to determine the increase or decrease of disability due solely to the injury. Compensation cases cannot be tried over and over again on the issues of the existence of an accident resulting in an injury causing disability. If the injured employee has recovered from the injury or the disability resulting has increased or decreased, then the compensation act provides for vacation or modification.

This case presents to this court the determination from the evidence as to increase or decrease since June, 1924, of the employee's disability due solely to the injury, in May, 1932. A compensation case appealed from the district court will be tried in the supreme court *de novo* upon the record. Comp. St. 1929, sec. 48-137; *Travelers Ins. Co. v. Ohler,* 119 Neb. 121; *Peterson v. Borden's Produce Co.,* 125 Neb. 404.

A "trial *de novo*" in the supreme court means that the case will be tried on the same pleadings and evidence on which it was tried in district court. *Guaranty Fund Commission v. Teichmeier,* 119 Neb. 387.

Black's Law Dictionary defines trial *de novo* as "a new trial or retrial had in an appellate court in which the whole case is gone into as if no trial whatever had been had in the court below."

Mistake is not a ground provided by Nebraska workmen's compensation statutes to modify a final award of compensation. The judgment is final except that after six months it may be modified upon application of either party, for increase or decrease of disability, or for other reasons, such as death or marriage of defendants. Appeals from such judgment shall be prosecuted in accordance with general laws of the state except as provided by the

workmen's compensation statutes. Comp. St. 1929, sec. 48-139; *Lincoln Packing Co. v. Coe,* 120 Neb. 299.

To vacate a judgment awarding compensation after term for any reason not especially provided by the law in such cases, the procedure is that applicable in civil cases, as prescribed by article 20, ch. 20, Comp. St. 1929. If the mistake amounted to fraud, a court of equity could afford relief where petitioner, in the exercise of reasonable diligence, did not discover evidence of the fraud within time to avail himself of the statutory proceeding to vacate such a judgment. *Krause v. Long,* 109 Neb. 846.

In compensation cases the employee has the burden to establish that his disability was caused by accident arising out of and in the course of his employment. *Pensick v. Boehm,* 124 Neb. 28; *Bartlett v. Eaton,* 123 Neb. 599; *Saxton v. Sinclair Refining Co.,* 125 Neb. 468. But this rule is not applicable to a petition to modify an award after six months. The award being final upon all questions except extent of disability, the employee is not required to again prove that he was injured in an accident arising out of and in the course of his employment. Upon an application to modify an award under the workmen's compensation statutes, the burden of proof rests upon the petitioner to establish by a preponderance of the evidence that the disability has increased or decreased or terminated. Unless the condition has changed, there is no reason why the award should be modified. *Southern Surety Co. v. Parmely,* 121 Neb. 146; *Ex parte George C. Brown & Co.,* 211 Ala. 530.

In the present trial medical experts testified for both plaintiff and defendant. Two reputable physicians testified for the plaintiff. One, Dr. Pulver, testified that at the first examination Mrs. Jensen claimed to have slipped and fallen backwards on her shoulders and head—head first; that at the time it appeared to him that she had a general shaking up; that the X-rays taken at the time were all negative and there were no objective symptoms of injury then and have never been since. He testified

in response to a hypothetical question which stated that, if the testimony of defendant's activities about her home is true, her present condition has no relation to any accident, that her present condition is due to arthritis and that there is no reason why she could not perform the work of washing dishes in a small restaurant.

Another, Dr. Young, testified that he examined the defendant in 1925 and again in 1928 and from his examinations he concluded that her condition was dependent upon the emotional condition of the patient and not upon a physical cause; that there were no organic findings and no evidence of physical disturbances of cerebellum or of those nerve pathways in the spinal cord or in the brain that govern coordination of movement. He stated that if the defendant's activities around her home were such as testified to by other witnesses she was not disabled, but was malingering, and that it was his opinion that she would be able to work as a dishwasher in a restaurant, her occupation prior to 1924. He states that her condition is practically the same as it has been at all times since 1924.

On the other hand, three equally reputable medical experts testified in behalf of the defendant. Dr. Overgard testified that, upon an examination in 1927, he found: "The spinous processes at the eleventh and twelfth dorsal vertebrae appear irregular in outline. There is new bone formation between those processes. The anterior posterior view shows some irregularity in outline of the bodies of the eleventh and twelfth dorsal vertebrae." He examined Mrs. Jensen December 6, 1933, just prior to the trial, and found a definite fusing of the bodies between the eleventh and twelfth dorsal vertebrae and the body of the first lumbar vertebra which is the result of an injury of probably long standing. The spinous processes of the eleventh and twelfth dorsal vertebrae, after investigating, have had the appearance of being partly absorbed, probably from the same injury. It looks like it is one solid piece of bone. She has a permanent stiffening of the

vertebrae there and that is bound to have an effect upon the muscles that are attached there and also on the nervous supply. She cannot do any work because she has no particular balance. The fusion of the bones might or might not be due to accident but it is usually due to trauma, but rheumatism or arthritis would also cause a boney deposit. Older people have boney deposits and the tendency is to increase as one gets older. The X-rays are not sharp pictures, because the patient moved a little. The fusion caused by arthritis would not be localized in one particular spot. The fusion in Mrs. Jensen is confined to her spine, although he made no X-ray pictures of other bones of the body. He thought she could probably use her hands on something that she could work from her elbows down. But he thought she was unable to do anything that put her shoulders into play, or put strain on her back, and if she attempted to walk without aid of a crutch, she would fall. He further expressed the opinion that she could not wash dishes in a restaurant because of her disability. She might do some work sitting down.

Dr. Neuhaus examined her in 1924 and a few weeks before the trial. He testified that she was disabled, which inability, he thought, was caused by the accident; that she had difficulty in walking and could not work as a dishwasher in a restaurant as she had prior to the accident. It is his opinion that she has traumatic neurosis which is purely a mental condition.

Dr. Nolan made an examination of defendant about a couple of weeks before the trial in December, 1933. He saw the X-ray plates, and it was his opinion that her disability was caused by an abnormal fixation of the segments of the vertebrae, especially in the thoracic and lumbar region, and a disturbance of the muscles of the lumbar region; that she was unable to balance herself and to walk without aid of some support. In his opinion her condition is attributable to an injury to the spine as shown in the X-ray films. It is his opinion that she is

not able to pursue any gainful occupation and cannot wash dishes in a restaurant as before.

From the record this appears to be a long drawn-out contest between the expert medical witnesses employed by the plaintiff and those employed by the defendant. This disputed testimony of credible witnesses, taken by itself, is not sufficient to support a finding that there is any changed condition which would justify a modification of the award of compensation made in 1924. Therefore, if the case had been submitted solely upon this evidence, it would require a finding for the defendant.

However, there is other testimony in the record which requires our consideration. Several lay witnesses testified that they had observed the defendant on many days at her home, an acreage property near Nashville. These witnesses testified that they watched her activities for considerable periods of time upon numerous days and that she was very active about the place. Among other things they testified that they saw her pump water and carry it in a pail to her pigs; that they saw her hoeing in the garden for as much as thirty minutes at a time; that they saw her go out and up a hill, crawl under a barbed-wire fence and move a picketed cow; that she did her own washing in tubs outdoors, and that on one occasion she took a stick and beat a rug; that the ground was rough and that her property was on a sidehill and that she walked all over the place without hanging onto anything and without the aid of a crutch.

The testimony of these witnesses was corroborated by moving pictures which they took of the defendant's activities. This evidence was very impressive because it establishes beyond dispute that the defendant's condition is not such as she led the physicians who testified in her behalf to believe. The testimony relating to her method of walking with a crutch and hanging onto furniture while in the doctors' offices and the history of her condition is incompatible with her activities around her home where she walked from her house to the barn, a distance of 75 or 100

feet, and elsewhere about her place without use of any crutch. This evidence is conclusive of the fact that her condition is not at the present time as the court found it to be in 1924, and that her disability from the accident has decreased. The weight of this testimony added to that of the expert witnesses who testified for plaintiff forces us to the conclusion that her disability has terminated. The testimony reveals her as a rather large and heavy woman, 62 years of age, and, as described by one of the expert witnesses, is as active as would be expected of one of her age and weight.

This court is further impressed by the fact that, while the defendant lives with her two adult sons and her condition was called in question by lay witnesses who testified as to her activities around the home, neither she nor her sons took the witness-stand and denied the testimony or explained any of her activities. While, of course, their failure to testify would not be decisive against her, it is a significant fact to be taken into consideration. Furthermore, she did not testify as to her disability. This seriously affects the weight of the expert testimony in her behalf. The opinions of the experts were based in a large measure upon the statements made to them by her, especially her inability to walk. The truth of these statements is disproved by several lay witnesses and the pictures introduced in evidence. Her statements to the physicians were not made under oath but were self-serving declarations. When these statements were proved false by undisputed evidence, the weight of the testimony of the expert witnesses based in part upon the false assumption is greatly impaired. The credibility of their opinions is not greater than the truth of the facts upon which it is based. An opinion that one cannot walk is overcome by undisputed evidence that one does walk. This court reaches the conclusion, as did the trial court, that the defendant's disability has terminated and that the payments for compensation should be terminated as of June 27, 1932, the date the application to modify was filed.

AFFIRMED.

ELROY S. MUNSON, ADMINISTRATOR, APPELLEE, V. PROVIDENT MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

FILED APRIL 20, 1934. No. 28911.

Death. Presumption of death of an absentee, founded on a reasonable probability, while upon an automobile journey of special peril, sustained for reasons set out in the opinion in the case of *Munson v. New England Mutual Life Ins. Co.*, p. 775, *post*.

APPEAL from the district court for Hamilton county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

Peterson & Devoe, for appellant.

Craft, Edgerton & Fraizer, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and MESSMORE, District Judge.

PAINE, J.

This is an action at law upon an old line life insurance policy for $2,000 for the death of the insured, brought after seven years had elapsed from the time he was last seen.

The defendant company admits the issuance upon February 17, 1915, to Albert R. Munson, aged 23, of policy No. 231252, for a yearly premium of $60, to be paid annually for 20 years, the beneficiary being his estate, and said policy to be paid up on February 17, 1935, and to be payable as an endowment on February 17, 1952. Defendant admits the payment of the ninth annual premium, due on February 17, 1923, the next premium being payable February 17, 1924.

It is also alleged by said defendant that on September 12, 1923, Albert R. Munson secured a loan upon said policy in the sum of $325, with 6 per cent. interest, which he used in an automobile trade at Omaha, and that said policy loan was a valid obligation against the policy, together with interest thereon. That upon February 17, 1924, the policy having ceased to be in force because of the nonpayment of the premium due that day, the amount

of the loan and interest then due was deducted from the cash value, and the balance of the cash value of said policy was applied to purchase a paid-up participating policy for $180, payable under the same conditions as the original policy. Defendant denies that Albert R. Munson is dead, or that proof of death has been supplied.

For reply the plaintiff denies that the cash value of said policy could lawfully be used to purchase paid-up insurance, and alleges that any attempt so to do was entirely unlawful and unauthorized, because the said Albert R. Munson, insured, was dead at the time the officers attempted to enter up said purchase of paid-up insurance by notation on the back of the policy at a time when they were holding it as collateral for the loan.

This is a companion case to *Munson v. New England Mutual Life Ins. Co.*, p. 775, *post*, and a full discussion of the evidence and law will be found in that case. The court entered a judgment in the case at bar, finding that Albert R. Munson came to his death prior to October 15, 1923, and that the principal and interest on said loan of $325 amounted to $512.97 on the date of the decree, April 3, 1933; that the plaintiff was entitled to judgment upon the face of the policy of $2,000, with 7 per cent. interest from February 13, 1932, the date of filing the petition, making a total of $2,159.43, leaving a net amount of the judgment of $1,646.46, with interest, and an attorney's fee of $200.

Finding no error in the record, the said judgment is affirmed, together with an attorney's fee in this court of $100.

AFFIRMED.

DAY, J., dissenting.

In so far as applicable to this case, I entertain the same view expressed in *Munson v. New England Mutual Life Ins. Co.*, p. 775, *post*.

ELROY S. MUNSON, ADMINISTRATOR, APPELLEE, V. NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

FILED APRIL 20, 1934. No. 28921.

1. **Death.** The presumption of continued life of an absentee continues for seven years.
2. ———. But seven years of unexplained absence raises the presumption that the missing one is not then alive.
3. ———. Such presumption of death after seven years requires that he who asserts an absentee is then alive must prove it.
4. ———. If it is asserted that an absentee died in less than the seven years, the burden is on the one so claiming to prove such fact.
5. ———. To raise the presumption of death at any particular time less than the seven-year period, facts and circumstances of special peril must be shown which make it more probable that he died at a particular time than that he survived.
6. ———. Presumption of death of an absentee, founded on a reasonable probability, must prevail against mere possibilities; otherwise, the conclusion of death could never be reached until his natural life expectancy had run.
7. ———. When a young man of excellent habits and good prospects, who is happy and contented with his lot in life, suddenly disappears while making a cross-country automobile trip alone, through a sparsely settled region, which journey subjects him to certain special perils, and he never thereafter is found, nor does he ever communicate with the members of his family, for whom he has shown unusual attachment, the law raises the presumption of his death while upon this trip.

APPEAL from the district court for Hamilton county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

William Baird & Sons, for appellant.

Craft, Edgerton & Fraizer, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and MESSMORE, District Judge.

PAINE, J.

This is an action at law upon an old line life insurance policy of $3,000 for the death of the insured, brought

after seven years had elapsed from the time he was last seen.

The evidence shows that Albert Russel Munson, usually called Russel Munson, was born at Aurora, Nebraska, October 23, 1891, and that at Lincoln, Nebraska, he took out a policy of insurance in the defendant company upon October 14, 1919, in the sum of $3,000, being an ordinary life policy, with a premium of $75.60 a year, the policy having double indemnity for accidental death and also total permanent disability clauses, which features are not involved in this action. This young man was unmarried, and, so far as the evidence discloses, he had no attachment for any young lady. He was a member of the Masonic lodge and also of the International Typographical Union. He had spent his entire life, with the exception of a few years, in Aurora, where he graduated from the high school in 1911 or 1912. He had always enjoyed good health, and was mentally well balanced. He learned the printing business at the Burr Publishing Company at Aurora, and became an operator upon the linotype, and supported himself at that occupation while attending the State University at Lincoln for two years. He was very devoted to his parents, and particularly attached to his sister Frances, having been her pal from their earliest childhood days. He enlisted and served in the United States navy during the war, and remained in the navy for some time thereafter, writing many letters home, inclosing snapshots. One of these letters was found, and introduced in evidence, which was written by him to his mother from Honolulu. It discloses somewhat intimate details of the young man's life and thoughts, and reads, in part, as follows:

"Army and Navy
"Young Men's Christian Association
"With the Colors

"Dec. 27, '18

"Dear Mother: Just got your letter and the box. I can use the wrist-gloves or whatever you call 'em fine.

The cookies were sure good, tasted nice and fresh, got two of them in my pocket. The socks come in handy; I needed some. The tooth paste and shaving soap will be useful. I was just out of tooth paste. I am smoking one of the cigarets now. If the Oregon goes for a trip, they will be almost indispensable. * * * Yes, I got the cake on Thanksgiving. Didn't I tell you before? * * *

"Frances said something about her blouse in her last letter. I spent what she sent for a blouse, but I'm afraid the sleeves are too short for her, so I'll get one on pay day that will be all right. Tell her she don't need to send me any more money,—I'm not used to it any more. I've been getting along without it quite often lately and not really missing it.

"Dad should get my $50 bond on the 3d loan some time in February. If he can take care of my insurance premium I'll send him the balance as soon as he will let me know how much it is.

"Christmas day was quiet. We had nice weather,—lots to eat,—see menu inclosed. They left the food on the tables all afternoon and we could eat at any time. Our candy was made on the island and was regular Christmas candy. * * *

"I guess I've answered all questions & told all the news. Lots of love from Russel."

There is another letter in the record that was written to his father from Long Pine, Nebraska, and reads, in part, as follows:

"The Long Pine Journal
"A. R. Munson, Editor
"Long Pine, Nebraska
"Published in 'Nebraska's Hidden Paradise'
"June 23, 1923.

"Dear Dad: There's not much to write about, except to let you know I'm still 'kicking.' * * *

"Receipts last month were a little short and expense a little long so I did not come out very good. This month will be better so far as the newspaper is concerned. There

is about $50 worth of job work to collect so far. Of course, the rest of the month may more than double the job work total. It's been pretty quiet for several weeks. I think I'll let one of the boys go after another week. The boy I keep gets $15 a week, the one I'll let go $10.

"I got two spinners today and think I'll go down to the creek (½ mile) and have a try for a trout. They bite (strike) good about dusk. It is almost like fishing in your backyard.

"I hope mother is getting along all right. I don't figure on you being other than as usual. Give Frances & Jean and M. J. a kiss for me. Love,

"Russel."

While he attended the university, and also while he lived in Aurora, he was an active member of the Nebraska National Guard. He had purchased the Long Pine Journal, and was paying for it on a contract, and drove from Long Pine to Omaha about the middle of September, 1923, and secured some engraved wedding announcements, which he had ordered for his sister's wedding, which was to occur October 15, 1923. He had his own ideas about the proper form of wedding announcements, and purchased these for his sister and took them from Omaha to Aurora and delivered them personally to his sister, saying that this was his wedding present to her. While he remained in Omaha on this trip, he traded off his old car for a second-hand Ford, and drove that to Aurora. He visited in Aurora for several days, and then he bade his family goodbye, promising Frances to be on hand sure for her wedding, which was to occur so soon. From the time he drove away from his home at Aurora that day, nothing has ever been seen or heard of this young man, or the car that he was driving. He had no bad habits, such as gambling or drinking. There is not the slightest indication that he contemplated suicide, nor has there been disclosed any motive or reason for him to abandon his growing business at Long Pine or his family at Aurora. It is logical to draw the conclusion from such

evidence that he was made away with, against his will and by violence, at some date between the hour he left his family at Aurora and the date of his sister's wedding, October 15, 1923. Automobiles abandoned by the owners are easily found and identified, but a criminal hitchhiker often uses the automobile of one he has made away with to make his escape to a far distant country.

When it was found that he had disappeared, his father sent out radio announcements from WOW, radio station at Omaha, broadcasting his disappearance. All of the relatives of the family in Colorado and on the Pacific coast were communicated with. Newspapers were scanned, and the father sent his picture and all of his credentials to the navy department, seeking their help in locating him, and after a voluminous correspondence they were unable to get any track of him. The father watched the newspapers very carefully for disappearances, and every other shred of information that would throw light upon his son, up until the time of his death, September 30, 1929, and the state newspapers that carried the account of the father's death also carried full details of the disappearance of the son, Russel Munson.

The law seems to be well established that the presumption of death after an unexplained absence for seven years does not necessarily imply that the person died at the end of that period, but that, after seven years of unexplained absence, the presumption of death requires that the one who asserts that he is alive must prove it, and, on the other hand, if it is asserted that the one who disappeared died in less than seven years, the burden is then upon the one asserting that death occurred at some particular time prior to the termination of the seven years to prove that fact. See *Holdrege v. Livingston*, 79 Neb. 238; *McLaughlin v. Sovereign Camp, W. O. W.*, 97 Neb. 71; *Rosencrans v. Modern Woodmen of America*, 97 Neb. 568; *McLean v. Grand Lodge, A. O. U. W.*, 59 S. Dak. 17; *Crane v. Grand Lodge, A. O. U. W.*, 106 Neb. 291; *Masters v. Modern Woodmen of America*, 102 Neb.

672; *Davie v. Briggs*, 97 U. S. 628; *Haddock v. Meagher*, 180 Ia. 264; *Bonslett v. New York Life Ins. Co.*, 190 S. W. (Mo.) 870.

"Presumption of continued life of one who has disappeared from his home and the knowledge of his family, in the absence of proof to the contrary, continues for seven years. At the end of that time, and not until then, it ceases to operate and the presumption of death takes its place. The latter presumption is to the effect only that the missing one is not then alive and does not prove death at any precise time within the seven-year period." *Goodier v. Mutual Life Ins. Co.*, 158 Minn. 1, 34 A. L. R. 1383.

"Thus evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, may be sufficient to raise the presumption or to warrant an inference of the death of one absent and unheard from, without regard to the duration of such absence." 8 R. C. L. 712, sec. 8. See *Tisdale v. Connecticut Mutual Life Ins. Co.*, 26 Ia. 170, 96 Am. Dec. 136.

A member of a mutual benefit association had paid all the assessments made on him by the association up to the time when he disappeared. The association thereupon declined to accept payment of the assessment coming due subsequent to his disappearance, tendered by the beneficiary named in the certificate, on account of such disappearance, and did no longer make any assessments on him. Held, (in an action brought on such certificate after seven years from the disappearance of such member had elapsed) that, the presumption being that he was dead, the beneficiary was entitled to recover on the certificate. *Supreme Commandery of K. G. R. v. Everding*, 20 Ohio C. C. Rep. 689, 11 O. C. D. 419; 14 Deitch, Digest of Insurance Cases, 352.

It has long been the law that, if an absentee was in contact with a specific peril, as a shipwreck, such circumstances might raise a presumption of death without

regard to the lapse of the seven years. Other circumstances may well create the same presumption, as where the circumstances of the disappearance are more consistent with the theory of death than that of the continuance of life when considered with reference to those influences and motives which ordinarily govern men, in either of which cases the jury may infer death at any time within the seven years, such as may seem to it most probable. 104 Am. St. Rep. 206, see notes; *Lancaster v. Washington Life Ins. Co.*, 62 Mo. 121.

"To raise the presumption of death at any particular time special facts and circumstances should, however, be shown, reasonably conducing to that end. The evidence need not be direct or positive, but it must be of such a character as to make it more probable that he died at a particular time than that he survived." 8 R. C. L. 712, sec. 8.

This court has very recently had a similar case before it, entitled *Fredrikson v. Massachusetts Mutual Life Ins. Co., ante*, p. 240, in which we reviewed many of the Nebraska cases relating to disappearances. *Thomas v. Thomas*, 16 Neb. 553, alleged the death of a former husband because of seven years' absence. In *Cox v. Ellsworth*, 18 Neb. 664, this court considered the common-law presumption of death after seven years. This was an equity case to reform a deed, and it was there held: "Evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard from may be inferred without regard to the duration of such absence."

In order to recover in the case at bar, the plaintiff is required to show that the insured came to his death prior to November 14, 1923, when the policy became in default for the nonpayment of premiums. This court has had several cases of this nature.

Judge Letton decided the case of *Coe v. National Council of K. & L. of S.*, 96 Neb. 130, L. R. A. 1915B, 744, Ann. Cas. 1916B, 65, and used as his syllabus the two paragraphs which were first announced in the case of *Cox v. Ellsworth, supra.* In this *Coe* case, Dr. Ganson was sleeping in a little tent in his back yard with a young son. At 2 o'clock in the morning the boy cried, and the mother found that the father was not there. At 6 o'clock in the morning his bicycle was found at Riverside Park, Omaha, near the Missouri river, his clothes were on a stick stuck in the mud on the bank of the river, and tracks of a barefoot man led from this point to the water's edge. The river was dragged, dynamite was used, and a day or so later men who were working in a brickyard testified they saw a body floating down the river. Judge Letton said that all of his clothing was accounted for. It was not shown that he was in possession of any money. His last known appearance in life was when he stood unclad upon the bank of the treacherous Missouri river, and a naked body was seen a few days afterward in the river at a point below, and that these facts were sufficient to justify the district court in finding that he died as alleged in the petition, the presumption being that he died as of the date he entered the water.

A watchman upon a railroad bridge in Omaha disappeared, his cap being found upon latticework, and his lunch uneaten. This court said: "The defendant offered to pay if 'positive proof' was furnished. This must be held to mean proof as positive as the circumstances reasonably afford, and positive enough to satisfy the judgment of reasonable men. Otherwise, where, as in convulsions of nature, such as floods, tornadoes and tidal waves, or in catastrophes, such as conflagrations or explosions, where it is very frequently impossible to furnish absolute proof of death by the production of the body, the insurer might escape a just liability." *Mitchell v. Brotherhood of Locomotive Firemen and Enginemen,* 103 Neb. 791.

In former times, as has been stated herein, the loss of

a ship at sea, or the burning of a building, were held to be special perils on a definite date, and if one who had been in the ship or building was never seen thereafter, the courts decided that the absentee had come to his death on that day.

Today more people are subjected to the perils of automobile traffic than are killed in burning buildings or lost ships, for these modern, fast, and reliable cars are being used to make hazardous trips in every continent, not only across deserts and mountains, but to the most desolate regions. Trips are made daily by lone drivers in automobiles which formerly would not have been undertaken, except when several men were traveling together, prepared for the dangers of the road. Even along the most frequented highways, all traffic must make certain legal stops, at which hikers have the opportunity to forcibly board a car against the driver's wishes. Other drivers, with no thought of danger, will invite a criminal to ride with them, whose only desire is to obtain possession of their car at any cost. Our daily newspapers often carry accounts of perils to automobilists from fleeing gangsters.

It is insisted that no such criminal acts have been proved in this case. True, but a fine young man has been lost to this world by an unknown peril. Why should a court shut its eyes to the known dangers found in automobile traffic, when such dangers are not only the possible but the probable cause of his untimely disappearance?

Presumptions founded on a reasonable probability must prevail as against mere possibilities; otherwise, the conclusion could never be arrived at, that a man was dead, until the natural limit of human life had been reached. *Merritt v. Thompson,* 1 Hilt. (N. Y.) 550.

Let us briefly review the evidence in the case at bar which relates to the time of death. A single young man, who was healthy, sober, industrious, and of excellent habits, had a deep affection for the members of his family, and never remained away from home for any considerable

length of time without writing to them, suddenly drops out of sight. This young man, who was of a hopeful and contented disposition, and satisfied with his lot in life, who was prospering in business, and whose principal recreation was trout fishing, starts out on this last automobile trip with only $11 in his pockets. This trip is a cross-country journey, requiring the traversing of eight or nine counties, one of them inland, without railroads or main highways, and which counties 11 years ago were very sparsely settled, up in the sandhill and lake country of north central Nebraska. This young man leaves, promising his sister, for whom he had unusual affection, that he would return shortly for her wedding, plans for which marriage he had been much interested in, announcements for which he had designed and had had engraved at his own expense. It must be quite evident that he would have been back in Aurora for this wedding on October 15, 1923, if he had not been overtaken by some calamity. Is the presumption of his death, prior to October 15, 1923, founded on a reasonable probability? We hold that it is, because the habits, character, domestic relations, which were unblemished, as well as his promise to attend an important event; in fact, all the facts and circumstances, except only his exposure to the special perils of a lone automobilist upon unfrequented roads, make it certain that, if alive within the period set out, he would have returned to, or communicated with, his parents or sister. *Reedy v. Millizen*, 155 Ill. 636. The reason that such evidence raises a presumption of death is obvious; absence from any other cause, being without motive, and inconsistent with the very nature of the person, is improbable. Such absence might be on account of insanity, but as death under such circumstances is more probable than insanity, in the entire absence of the slightest evidence thereof, the law raises the presumption of death. Lawson, Law of Presumptive Evidence, 289.

The district court tried this case without the assistance of a jury, and its findings are, therefore, entitled to great

weight. In the judgment entered by it, we find this paragraph: "The court further finds that the deceased was so circumstanced and possessed of such a character and habits at the time he disappeared, about the middle of September, 1923, that no other reasonable inference is to be drawn from his disappearance than that he died soon after his disappearance, and that his death took place between the middle of September, 1923, at the time he left the home of his parents in Aurora, Nebraska, and October 15, 1923, the time his sister, formerly Frances Munson, was married."

The record has been examined by this court, and sustains the judgment entered for the plaintiff. Attorney's fees in this court allowed in the sum of $150.

AFFIRMED.

DAY, J., dissenting.

As a matter of law, an automobile drive from Aurora to Long Pine is not a special peril comparable to a loss of a ship at sea or a burning building sufficient to justify an inference that death occurred at a certain time. This conclusion is not supported by the evidence in the record, and my personal experience, even if a proper consideration, does not impel me to agree.

MILDRED V. GATES, APPELLEE, V. CITY OF NORTH PLATTE, APPELLANT.

FILED APRIL 20, 1934. No. 28886.

1. **Appeal.** Instructions will not be reviewed where those given are grouped in one assignment and those refused were grouped in another assignment in motion for new trial, and all of them given were not erroneous, and at least one of the requests was rightfully refused.
2. **Municipal Corporations: INJURY TO PEDESTRIAN: LIABILITY.** Evidence *held* insufficient to sustain verdict awarding damages to pedestrian against municipality on account of injuries sustained when pedestrian stepped on a water-meter box cover in parkway strip between sidewalk and curb.

3. ———: CARE OF STREETS. City must take cognizance of fact that pedestrians have occasion to walk on parking strip along street, and although pedestrian must expect to find fixed objects, as electric light poles, fire hydrants and meter boxes, and must be contented with a grassy surface, the city must exercise due care to have such area in reasonably safe condition.
4. ———: ———. Municipal corporation is not insurer against all injury which may result from obstructions or defects in its parkways.
5. ———: ———. Municipal corporation is not, in absence of actual notice, ordinarily liable for failing to discover existence of defect in manhole cover which has been properly constructed, regularly inspected and was apparently safe and secure.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Reversed.*

James T. Keefe, for appellant.

C. S. Beck and *E. H. Evans, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LANDIS, District Judge.

LANDIS, District Judge.

Mildred V. Gates stepped upon a water-meter box cover in the parkway strip between the sidewalk and the curb at 800 South Dewey street in the city of North Platte, and, as a result of the accident, sustained injuries for which she was awarded $300 damages in an action brought against the city in the district court for Lincoln county. The purpose of this proceeding is to secure a reversal of plaintiff's judgment.

It is claimed that the court erred in giving certain instructions, and in refusing others requested by the defendant city. The instructions given were grouped in one assignment, and those refused were grouped in another assignment in the motion for new trial; hence, the instructions will not be reviewed, as all of them given were not erroneous, and at least one of defendant city's requests was rightfully refused. *Home Fire Ins. Co. v.*

Phelps, 51 Neb. 623; *Walters v. Village of Exeter*, 87 Neb. 125.

The serious question in this case is the sufficiency of the evidence to sustain the verdict, which was raised in the motion for new trial, and is properly before us.

Plaintiff's petition sets out her claim of negligence upon which issue was joined as:

"4. That it is the duty of the defendant to provide adequate manhole covers and to exercise reasonable care and diligence to the end that said manhole covers will sustain such weight as could reasonably be expected to come upon them and that the said defendant is guilty of negligence in that the said defendant maintained said manhole cover above described in a defective condition, and that as a result thereof plaintiff was injured.

"4½. That the defendant for a long time well knew that the tile covering over said manhole was of a fragile nature, easily broken and unsafe for pedestrians, but notwithstanding such knowledge, the defendant wrongfully, carelessly and with gross and extreme negligence and indifference, and with total disregard for the public safety, did keep and maintain said tile as a covering for such manhole and excavation, and said defendant well knowing of the existence of said manhole and its dangerous covering and condition did further carelessly and with gross and extreme negligence and total indifference to the safety of the public fail, neglect and refuse to place any guard-rail, obstruction or hindrance about such manhole and did further neglect, fail and refuse to cover said manhole with a material or substance of sufficient strength to sustain the weight of any person who might step thereon."

The record fails to show that the defendant city maintained the manhole cover in a defective condition; that the cover was of fragile nature, easily broken and unsafe for pedestrians; that it was dangerous or of a material or substance of insufficient strength to sustain the weight reasonably expected to come upon it, or that it was of

unsuitable construction, or that there was an absence of a guard-rail.

Upon the other hand, the evidence shows the manhole cover was of suitable construction, not of a fragile nature; that the city read the meters every three months, at which time the manhole covers were inspected; that the manhole cover in question was inspected on March 21, 1931, two days before the plaintiff's accident, and found without flaws; that plaintiff passed this manhole cover many times and never noticed anything wrong about it; that there was never any actual or constructive notice to the city of any defect in the cover.

A city is required to take cognizance of the fact that pedestrians have occasion to walk over the parking strip along a street, and although the pedestrian must expect to find such fixed objects as electric light poles, fire hydrants and meter boxes, and must be contented with a grassy surface instead of a smooth walk, the city must exercise due care to have such area in a reasonably safe condition. Annotation, 59 A. L. R. 387.

Also, a municipal corporation is not an insurer against all injury which may result from obstructions or defects in its parkways. In the absence of actual notice, it is not ordinarily liable for failing to discover the existence of a defect in a manhole cover which had been properly constructed, regularly inspected and was apparently safe and secure. *City of Lincoln v. Pirner*, 59 Neb. 634; *City of Omaha v. Kochem*, 74 Neb. 718; *Walters v. Village of Exeter*, 87 Neb. 125; *Strubble v. Village of DeWitt*, 81 Neb. 504; annotation, 20 L. R. A. n. s. 513; annotation, 59 A. L. R. 387; *Hashberger v. City of Schuyler*, 115 Neb. 639.

The injury sustained, according to the evidence, was not caused by any direct or positive act of the city or its servants, nor was it the result of negligence in original construction; but, so far as we are advised by the record, it was the result of natural conditions, the probability of which was as well known to plaintiff at the

time she stepped on the meter cover as it was to the city. There is no evidence that the city had express notice of any defect, or that there was such, so notorious as to be evident to all persons passing.

The ground of recovery against the city here is an act of commission or omission and it is necessary for the plaintiff to prove negligence on the part of the city. Negligence is an inference to be deduced from primary facts. It is not enough that an accident has happened, but it must be shown that the municipality was in fact guilty of negligence.

Hence, if the injury was not caused by any direct act or omission of the municipality and which was not the result of negligence in any respect according to the evidence, then the verdict cannot be sustained under such conditions.

REVERSED.

P. R. MCALLISTER, APPELLEE, V. MARYLAND CASUALTY COMPANY, APPELLANT.

FILED APRIL 20, 1934. No. 28922.

Insurance. Where an insurance company admits the authority of a local insurance agency to issue policies and receive premiums in payment thereof, and where an insured, having credit for unearned premiums with such agency from canceled policies of insurance in other insurance companies, makes a further cash payment to the agency to be applied on the payment of the premium with the insurance company sufficient, together with such credits, to pay the premium in full, such payment and credits amount to a payment of the premium due on the policy and the insurance company is bound to return the unearned portion of the premium to the insured on cancelation of its policy with the insured.

APPEAL from the district court for York county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Story & Thomas, for appellant.

Sandall & Webster, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and MESSMORE, District Judge.

MESSMORE, District Judge.

This is an appeal from the district court for York county, wherein that court found for plaintiff below, appellee herein; the cause having been tried to the court without the intervention of a jury.

Plaintiff's petition alleges that he is engaged in the truck and transfer business in York, Nebraska, and that defendant is a foreign incorporated insurance company, licensed to do business as such in the state of Nebraska; that on February 25, 1932, plaintiff received a policy of insurance from the authorized agent of defendant, bearing number OL-858613, insuring his automobiles, trucks and trailers, upon which there was due from plaintiff a premium of $362.36; that plaintiff thereafter paid said premium to the duly authorized agent of the defendant company on March 1, 1932, and said agent issued a receipt to plaintiff in full payment of said premium; that defendant company attempted to cancel said policy of insurance for nonpayment of the premium on March 23, 1932; that defendant company has refused and still refuses to return the unearned *pro rata* premium on said policy in the sum of $324.59, for which sum plaintiff prays judgment against defendant company.

The answer of defendant admits the identity of the parties and the issuance of the policy of insurance on February 25, 1932, and that it gave notice of the cancelation of said policy for nonpayment of premium on March 23, 1932, effective April 2, 1932; alleges that its alleged agent was personally indebted to plaintiff prior to the issuance of said policy on February 25, 1932, and that said agent applied the money due plaintiff on other canceled policies against the premium due on said policy; that defendant has received no part of the premium due on said policy; alleges that the action is not based on

the policy of insurance but is for money paid and received; denies each and every allegation of the petition not admitted in the answer.

Plaintiff, in reply, denies each and every allegation of fact contained in the answer and specifically denies that the action is not based on the insurance policy but is for money paid and received.

J. R. Wessels testified in behalf of plaintiff to the effect that he was the agent for the defendant company for four years prior to February 25, 1932; that Dominy & Sons, of Hastings, Nebraska, were writing the policies for defendant company, and when a policy was delivered to the witness for subsequent transmittal to the insured he would remit to Dominy & Sons within 45 days of the date of issuance of the policy and its delivery to witness; that the premium of $362.36 due on the policy of defendant issued to plaintiff was charged by Dominy & Sons to the York Insurance Agency, of which the witness and one Paul Farm were owners and managers.

Plaintiff testified that Hilda Wessels, daughter of J. R. Wessels, delivered to him the policy in question in this action, and that he paid the amount of the premium, $362.36, as evidenced by exhibit 2 in the record, dated March 1, 1932; that he later received notice of cancelation of the policy from the defendant company under date of March 23, 1932, as evidenced by exhibit 3 in the record; that the policy went into effect February 25, 1932.

Hilda Wessels testified that some time prior to February, 1932, she was in the employ of the York Insurance Agency, which firm had an agency contract with the defendant company, or with Dominy & Sons, or with Dominy & Steele, authorizing it to issue policies and remit the premiums due thereon within 45 days; that the policy in question was issued on the order of C. M. Dominy & Sons, of Hastings, because of the nature of the business covered, was written by the Hastings firm and sent by it to the York Insurance Agency and delivered by it to plaintiff, the premium thereon to be paid by

plaintiff within 30 days of the delivery of the policy to him, and the York Insurance Agency was to remit to Dominy & Sons within 45 days after the receipt of the policy by it. The witness also identified the receipt issued to plaintiff by her for payment in full of his account of the premium due on the policy in question.

The defendant company tendered into court the sum of $63.20, which, it alleges, is the amount of the unearned premium on the check of $100 paid by plaintiff on March 1, 1932, and which it admits is a valid payment on the premium and legally tendered after the issuance of its policy, and offered to confess judgment in that amount, which tender was refused.

It may be stated at the outset that appellant and appellee have agreed on certain propositions of law, which may be summarized briefly, so we may get the connection, as follows: (1) That the powers of an agent of an insurance company are governed by the general law of agency. (2) An agent of an insurance company who is authorized to accept applications and to receive advance premiums thereon is in the transmission of such applications and premiums the agent of the insurance company, and not of the insured; appellant contending, however, that the York Insurance Agency was the agent of plaintiff in the receipt and disbursement of his money, and not of appellant. (3) Where the relation of agency legally exists, the principal will be liable to third persons for all acts committed by the agent in his behalf in the course of and within the actual or apparent scope of his agency. (4) Payment of premium to insurer's authorized agent is payment to the insurer.

Appellant disagrees with the proposition of law contended for by appellee that payment of the premium in cash may be waived by an agent authorized to deliver policies and receive payments, notwithstanding a stipulation in the policy to the contrary. This proposition cannot be seriously contended for by appellee in view of the

fact that he has failed to avail himself of it by properly pleading estoppel.

Therefore, we come to the important question in this case: Did the York Insurance Agency have any money on hand on March 1, 1932, belonging to appellee? Appellant's policy was issued February 25, 1932, and the record shows only one payment by appellee subsequent to that date, that of $100 on March 1, 1932, which it admits constituted a valid payment on the premium, but appellant contends that the York Insurance Agency used a credit of $113.46 from the Phenix Insurance Company as part payment of the premium on its policy and that the record shows no evidence that the Phenix Insurance Company ever returned the money to the York Insurance Agency for delivery to appellee. It does not dispute that a payment of $186.44 was made January 14, 1932, and that said payment was made on a policy issued by another company, but there is no evidence, it contends, that said sum was returned by such other insurance company to the York Insurance Agency for delivery to appellee. The record, however, does show that a credit memorandum was issued for this amount. Appellant further maintains that it appointed the York Insurance Agency to write insurance policies and do other duties connected therewith, but did not appoint such agency to act as a bank for the funds of appellee or as a collection agency for money due appellee from other insurance companies, and denies that such agency had money in its hands belonging to appellee at the time the receipt was issued.

Citation is made in appellee's brief of the case of the *Phoenix Ins. Co. v. Meier*, 28 Neb. 124, wherein it was held: "When an insurance agent, who has authority to issue policies of insurance, * * * agrees with the assured to deduct the premium out of money then in his possession belonging to the assured and apply it on the payment of the premium, such an agreement is a receipt of the premium, and the company issuing the policy will be bound thereby."

There is nothing in the record to sustain appellant's contention that the only amount that could be credited to the payment of the premium due on its policy was the sum of $100, paid by appellee by check March 1, 1932. The general agency of the York Insurance Agency is admitted. The credit to appellee with such agency existing at the time of the issuance of appellant's policy on February 25, 1932, was $186.44, which may have been paid to some other insurance company in the transaction of the general business of the agency, but which credit was due plaintiff and no part of which he received back, but which money he desired to have credited to the payment of insurance premiums on his trucks and trailers. There is nothing in the record to challenge the fact that this money or money of like character was not in existence to be paid in appellee's behalf for insurance premiums. The refund from the Phenix Insurance Company of $113.46 has been challenged by appellant as not having been returned to the York Insurance Agency on account of the moratorium issued by such company, but the record does disclose that $113.46 was credited to the York Insurance Agency's account and that that agency in turn credited appellee's account with it.

The trial court found from all the evidence that there was enough money in the possession of the York Insurance Agency from other insurance companies to the credit of appellee, together with the check of $100 paid by appellee to such agency, to pay the premium in full due on the policy of appellant and for which appellee received a receipt in full of such payment on March 1, 1932.

We believe that the principle adopted in the case of *Phoenix Ins. Co. v. Meier, supra,* is controlling, and that the judgment of the lower court should be and is hereby

AFFIRMED.

STATE SAVINGS & LOAN ASSOCIATION, APPELLEE, V. EFFIE V. MARTIN ET AL., APPELLEES: ERNEST DOLL ET AL., APPELLANTS.

FILED APRIL 20, 1934. No. 28853.

Mortgages: FORECLOSURE: SALE. The evidence examined and *held* land sold at judicial sale at a price not grossly inadequate; that method pursued by sheriff in selling property complied with law.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Wear, Garrotto & Boland, for appellants.

Webb, Sheehan & Kelley, contra.

Heard before ROSE and PAINE, JJ., and LIGHTNER, REDICK and THOMSEN, District Judges.

THOMSEN, District Judge.

This is a foreclosure of a mortgage. The property consists of 4.06 acres of unimproved land on the outskirts of the city of Omaha. The only purpose for which it has been used in recent years is as a shooting ground. It sold for $1,343 at sheriff's sale, subject to $600 of delinquent and unpaid taxes, or a total sale price of $1,943. One complaint is that the sale price is grossly inadequate. The values are established by three affidavits, one showing the reasonable value to be $1,800, two $5,000 and one reciting the sale price of adjoining property in 1923. It is apparent that the prices obtaining for adjoining land in 1923 would be of little value in determining the present reasonable value of the property.

This land is described as low land, "several feet lower than the established grade of highways adjoining it and other property adjoining these highways."

Appellants, although expressing the belief that the property should sell for the sum of $5,000, do not offer

any assurance of such sale or of any sale for more than the sum realized by the sheriff; nor do they offer to produce a purchaser for any sum whatever. Considering the general state of land values at present, the court cannot say, as a matter of law, that the sale price is so grossly inadequate as to shock the conscience.

The appellants complain that the property was not sold until about 11:15 a. m., when it was advertised for sale at 10:00 o'clock. The record shows that the sheriff was at the appointed place at 10:00 o'clock and remained there continuously until the close of the sale; that he offered a number of properties for sale at such time. The appellants have cited to us no authorities that would require a sheriff to cry the sale as an auctioneer does. The sale was properly advertised and the sheriff appeared at the time ready to receive bids. When the hour of 11:00 o'clock arrived, he announced that he had a bid on this property, and ultimately sold it on the bid so received. As a practical proposition, we can conceive of a situation in which very active bidding might go on beyond the hour, where great injustice might be done for a judicial sale to be required to be closed within the hour; and also during a time such as this when a great many sales are held at the same time. It is sufficient if the sheriff is present and remains during the appointed hour and is ready to receive bids as stated in his notice, so that every one who desires to offer a bid may have an opportunity to do so. 35 C. J. 35; *Culver Lumber & Mfg. Co. v. Culver*, 81 Ark. 102.

We have given careful consideration to the briefs of counsel and the record, but find nothing adverse to the conclusions heretofore reached. The sale is confirmed, with leave for appellants to redeem before mandate issues.

AFFIRMED.

JOSEPH L. FRANEK, APPELLANT, V. BUTLER COUNTY, APPELLEE.

FILED APRIL 27, 1934. No. 28917.

1. Highways: INJURIES: LIABILITY OF COUNTY. At common law counties are not liable for damages for injuries arising out of defects in roads or bridges.
2. ———: ———: ———. Counties under township organization are not liable for damages for injuries arising out of defects in a road or bridge, unless (1) the particular road has been designated as a county road or (2) the bridge passes over a stream.

APPEAL from the district court for Butler county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

J. J. Krajicek, Phillip A. Tomek and *John G. Tomek,* for appellant.

J. C. Hranac, Coufal & Shaw and *Ray E. Sabata, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and MESSMORE, District Judge.

GOSS, C. J.

At the conclusion of plaintiff's evidence the court directed a verdict for defendant. From the judgment of dismissal thereon plaintiff appealed.

Plaintiff sued for damages for personal injuries sustained when the automobile in which he was riding ran into a ditch across a road in Butler county. The road was under repairs and the ditch was caused by the removal of a culvert without the space occupied by it having yet been filled in. There was ample evidence to submit to a jury (in a proper case), subject to the element of his contributory negligence, that plaintiff suffered injuries and that the proximate cause was the condition of the road.

Plaintiff pleaded and defendant admitted that the county is under township organization. Township organization is provided for in sections 26-201 to 26-299, Comp. St. 1929,

and affords supervisors (instead of county commissioners), who divide the county into townships. For the purposes of this suit it does not seem necessary to go further into the contents of the chapter. The effect of the judgment below is to decide that a county under township organization is not liable for a defect in a road (or bridge) unless the county is liable to keep it in repair, and that this was not a road of that kind.

Section 39-832, Comp. St. 1929, makes a county liable for special damages caused by "insufficiency, or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair." Section 39-227, Comp. St. 1929, provides for the selection and designation, by the board of county commissioners or supervisors, of such laid out and platted public roads as are to be considered "county roads." Section 39-229, Comp. St. 1929, provides that the total mileage of such county roads should not exceed 25 per cent. of the total mileage of all the public highways within the county, and "all county roads designated in accordance with the preceding sections of this act shall be maintained at the expense of the county." Section 39-1206, Comp. St. 1929, provides that the expense of building, maintaining and repairing bridges on public roads "over streams" shall be borne exclusively by the county.

The culvert was removed and about 30 or 40 feet farther south it was supplanted by another bridge or culvert which was to perform the same office, but the grading had not been done to make the change effective. A detour along the roadway passed to the east of the location of the old culvert and the new bridge or culvert. The evidence shows that this bridge or culvert did not pass over any stream, and thus section 39-1206, *supra*, is not applicable.

There is no evidence, or presumption, that the road had ever been designated as a county road. This is a prerequisite to its maintenance at the expense of the county. *State v. Steffen*, 121 Neb. 39.

At common law a county was not liable for damages for injuries arising out of defects in highways or bridges. *Woods v. County Commissioners of Colfax County,* 10 Neb. 552; *Dawson County Irrigation Co. v. Dawson County,* 106 Neb. 367.

In the large mass of statutes relating to public roads we find no statute that makes a county under township organization liable for damages arising out of a status and circumstances such as these. Nor has the diligence of counsel resulted in the production of any. Under the township organization act of 1895 (Laws 1895, ch. 28) counties governed by that act were relieved from the duty "to construct, maintain and keep in repair ordinary highways and culverts" and from liability growing out of negligence in that respect. *Goes v. Gage County,* 67 Neb. 616. While later acts have amended the township organization statutes, we do not find that these amendments aid appellant.

The judgment of the district court is

AFFIRMED.

ROSE, J., dissents.

PAINE, J., dissenting.

I respectfully dissent from the main opinion in this case, which holds that counties under township organization are not liable for damages for injuries growing out of defects in a road or bridge unless the particular road has been designated as a county road, or unless the bridge passes over a stream.

The effect of this holding is to entirely relieve a county from liability; no matter how grossly negligent its officers or employees may have been, I presume it is held to be an illustration of *damnum absque injuria.*

However, the first fundamental legal principle set out in Broom's Legal Maxims, 131, is, "There is no wrong without a remedy," and my sense of justice abhors a situation which allows innocent travelers to be negligently injured by officers of a county and the county to escape scot-free.

This decision is founded upon many precedents, and it is now the duty of this court to refuse to blindly follow precedents which lead to injustice.

The sole question in this case is: Can a suit be maintained against a county under township organization for injuries sustained by reason of a negligent defect in a public highway, which was neither a state or federal highway, nor a part of the "county road system?"

What are the facts in this case? The plaintiff sues Butler county and Frank Dvorak, a road contractor, for $10,000 for damages for an accident, which occurred about as follows: The evidence discloses that the plaintiff, a man 28 years old, residing in Omaha, was going in his own automobile to visit some friends at Loma, Butler county, on July 11, 1931, at about 9 p. m.; and while on a main, well-traveled country road leading off from highway No. 16, and driving at about 15 miles an hour, the front end of the Whippet coach plunged down to the bottom of a hole reaching entirely across the road, where a culvert had been removed and no barricades erected, and the same was entirely unguarded in any manner whatever. Plaintiff had a deep gash above his eye, another on his left cheek, a laceration at the corner of his mouth, contusion and abrasion over both patellas, other abrasions over his forehead, and was laid up about four months with the injuries. He went to Brainard, Nebraska, where a doctor sewed up the cuts and administered first aid.

Butler county is under township organization, and the country road on which this hole was left open and unguarded had not been designated a county road nor a state highway. However, exhibit A shows that the board of supervisors of Butler county had undertaken to improve this road at the expense of the county, and publicly gave notice to contractors to submit bids upon a new construction of this road, making it much higher and much wider, and involving the excavation and hauling of approximately 65,400 cubic yards of earth. In the mem-

orandum it was stated that the *county,* not the township, would build all bridges and culverts. Frank Dvorak, one of the defendants, secured this road contract from Butler county for $11,172, and gave a bond to the county for the performance of the same, and was engaged in such work. In the answer filed by Frank Dvorak it was set out that a swale, or watercourse, crossed the highway at the place where the accident occurred, and that the accident was caused by the removal of a culvert or bridge over said swale or watercourse. The supervisor of that district of Butler county ordered Joseph Janek, the highway patrolman, to take out the old culvert, which left a wide open hole clear across the road. This was done on July 10, the day before the accident. The new bridge had already been put in by the county just south of this, and the old bridge taken out had been 16 feet long across the road, and about 8 feet wide, and the hole left was about 3 feet to 3½ feet deep, and the testimony was that no barricades, lights, or signs were put up on either side of this hole, and the hole was left open and unguarded.

This court held in *Goes v. Gage County,* 67 Neb. 616, decided in 1903, that counties under township organization were relieved from liability in reference to ordinary highways, etc. Then followed *Wilson v. Ulysses Township,* 72 Neb. 807, in 1904, holding that the rule of common-law liability applied to townships as well as counties, and a township was not liable for persons injured by defects in public highways within such township. Then followed an accident very similar to the case at bar, where a culvert was taken out by the township officers in the daytime, and left without barricades or signs or lights, in Yale township, Valley county, and that night an automobile plunged in, with damage to the occupants, and it was held that the exemption of a township extended to its officers, servants, and agents, in *Pester v. Holmes,* 109 Neb. 603.

The circle was now complete, and for damages by plunging into a great hole left in a highway by taking

out a culvert and leaving it unmarked and unguarded, neither the county, nor the township, nor the township's employees who were guilty of the negligence, were held to be in any wise liable. However, it does not appear that the question of the construction of all of the particular statutes relating thereto was before the court, or considered by it, in these cases.

The holding in the last above case, decided in 1923, is the more remarkable because since 1911 the duty of maintaining and keeping in repair the roads of counties under township organization has been placed upon the county, except as to certain state highways.

Chapter 116, Laws 1911, created a county highway commissioner, and said, each county "may" appoint a county highway commissioner, "and the county board shall have exclusive control, government and supervision of all the roads of the county." This statute was amended in 1917, providing that the county board could designate certain roads known as county roads, which should be maintained at the expense of the county. The statute was changed to make it mandatory that each county "shall" appoint a county highway commissioner, who should have general control, government and supervision of all the public roads and bridges in the county, under direction of the county board. Minor amendments were made to this statute in 1919 and 1923.

Section 39-101, Comp. St. 1929, provides: "The county board has a general supervision over the public roads of the county, with power to establish and maintain them as herein provided, and to see that the laws in relation to them are carried into effect."

Section 39-1312, Comp. St. 1929, provides that it shall be the duty of the county highway commissioner to have all traveled earth roads dragged regularly.

The county highway commissioner, with the county board, under section 39-1302, Comp. St. 1929, has the exclusive control, government, and supervision of all public roads and bridges in the county, except state high-

ways.

To give further legality to the acts of the county, there is now in force a law which clears up any question on the subject. Chapter 80, Laws 1931, now permits counties under township organization to execute written contracts for the construction, repair, or alteration of roads within any township therein, and while this was only approved May 2, 1931, yet Butler county was proceeding to do this very thing at the time of this accident. This chapter has now become section 39-1901, Comp. St. Supp. 1933, and this new law is referred to in *Cheney v. County Board of Supervisors,* 123 Neb. 624. This law is an evidence of a public policy to vest in counties adequate and ample powers enabling prompt and necessary action to be taken in all matters of maintenance and repair of public highways, and shows that it does not refer simply to the roads designated as county roads.

Back in 1879 it was provided that all section lines were public roads, and the county board was given the sole power to open and work them. Comp. St. 1929, sec. 39-145. No such power was given to the township.

The law relating to township road funds was amended in 1923 to provide that the expense of altering or changing a township road should be paid out of the general fund of the county. Comp. St. 1929, sec. 39-1201.

In *Bomark v. County of Harlan,* No. 25882, released July 19, 1927, Commissioner Sandall had before him a very similar case, in which a township road had been permitted to wash and waste away, creating a ditch in the highway. I realize that the opinion of the commission is the law only in the particular case decided, yet this opinion is of value in its discussion of the very point at issue in the case at bar. The district judge had instructed a verdict for the defendant county at the close of the plaintiff's evidence, and the commission reversed the trial court. A rehearing was allowed to the division of commissioners consisting of Wilson, Thompson, and Wolff, and upon December 23, 1927, a short opinion was

written by Commissioner Wilson, in which Commissioner Sandall's opinion was reconsidered, he having ceased to be a member of the commission. Commissioner Wilson wrote an additional opinion, saying that an erroneous construction had been placed upon section 2803, Comp. St. 1922, now section 39-1302, Comp. St. 1929, the county attorney of Harlan county contending that it meant that the county highway commissioner should only have control of public roads and bridges which were under the authority of the county board, instead of all roads, and Judge Wilson says that in their opinion the highway commissioner has the general control, government, and supervision of all public roads and bridges in the county, and that, after considering the briefs and listening to the oral arguments on rehearing, they adhere to the former opinion.

In 1889 the legislature passed chapter 7, the title of which read: "An act relating to highways and bridges and liabilities of counties for not keeping the same in repair." The complete act consisted of four sections, and section 1 provided: "That whenever any highway or bridge in any county in this state shall be out of repair or unsafe for travel, any three citizens or taxpayers in the state may notify the county commissioners of the commissioner district, within which the said road or bridge is situated, *or if the county be under township organization,* the supervisor of the town in which it is situated, in writing, setting forth a description of the road or bridge and the defects therein.

"Section 2. It shall then be the duty of the said commissioner of the said county or counties, within twenty-four (24) hours after service of said notice, to commence to make suitable repairs to said highway or bridge and to place it in a safe condition for travel."

Section 3 provided how the matter should be handled when the bridge was on the line between two counties, and section 4 has now become section 39-832, Comp. St. 1929, and this section reads: "If special damage happens

to any person, his team, carriage or other property by means of insufficiency, or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county, and if damages accrue in consequence of the insufficiency or want of repair of a road or bridge, erected and maintained by two or more counties, the action can be brought against all of the counties liable for the repairs of the same; and damages and costs shall be paid by the counties in proportion as they are liable for the repairs, provided, however, such action is commenced *within thirty days* of the time of the injury or damage occurring."

In the construction of a statute, in order to determine the true intention of the legislature, the particular clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts. Each clause will be illuminated by those which are cognate to it, and each provision should be read in the light of the whole. The rule stated is one of primary importance, and well established by authorities. Black, Interpretation of Laws (2d ed.) 317.

Applying these rules to the consideration of the four sections of chapter 7, Laws 1889, it follows that the terms employed in all four sections must be taken as expressing the same thought. Section 1 clearly sets out that the act applied to counties under township organization, and if that is true, then section 4 of the act, in using the word "county," must cover, as section 1 specifically does, counties under township organization. The subsequent repeal of any of these provisions or sections would not bring about a change in the construction of any section unrepealed, so that, as the original act covered counties under township organization, therefore, section 4 thereof must still so apply, and cover Butler county without question.

Section 13, art. I of our Bill of Rights, provides: "All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

But it has often been the plight of an injured person, who has been taken to a hospital and remained for some time, that they did not seek legal advice until after 30 days' limit provided above had expired. In *Madden v. Lancaster County*, 12 C. C. A. 566, 65 Fed. 188, it was held by the federal court that, as this provision gives a right of action, it is constitutional to limit the time within which it may be exercised, and that an action must be brought under this act within 30 days from the occurrence giving rise to the right, and not from the time when the whole consequent damage was suffered.

In *Swaney v. Gage County*, 64 Neb. 627, the plaintiff suffered damages on a defective bridge upon a public highway in Gage county upon November 6, 1899, and as the action was not commenced for 52 days after that date, it was held that the time of beginning the action could not be extended, even where the person was so severely injured that he became insane, and was legally *non compos mentis* from the 6th day of November, the date of the accident, until December 20, and in which case he commenced the action within eight days after recovering his sanity. In deciding that the suit could not be maintained, which was begun on the 52d day after the accident, this court said: "It must have been the intention of the legislature, in thus limiting the time for the commencement of actions under the section on which this suit is based, to require such suits to be prosecuted while the incidents were still fresh in the minds of every one connected therewith."

Let us now consider another phase of this question. Section 39-832, Comp. St. 1929, says the county must respond in damages to a person injured if the accident

occurs for want of repairs upon a highway or bridge which the county is "*liable* to keep in repair." The word "liable" is "a word with a common and ordinary signification. It has been variously defined as meaning accountable for or chargeable with." 36 C. J. 1132. Liability to repair means responsibility to repair.

It will be seen that, in the manner in which these terms are used, "liable to keep in repair" is related to the exact time of the accident, and if it is liable at that time, liability is established. Therefore, the right to recover depends upon the relation of the county to the defective road or bridge at the moment of the accident. This liability must be construed as a liability in fact, and may result from a *bona fide* contract liability, or from a liability declared by statute apart from contract.

The county is just as much liable for an act which it is authorized to contract to perform as it is for an act where its liability is expressly declared to be for a failure to perform an act. The county is charged with the duty of rebuilding this road and this bridge, and, to carry out that duty, Butler county let a contract to the lowest responsible bidder. The county is "liable" on its own contract to pay this contractor for rebuilding this road in which the defect occurred.

Where the proper authorities engage in grading or paving a highway which the county is liable to keep in repair, and do not close the same, but permit the continuance of public travel thereon, and damages accrue in consequence of the insufficiency or want of repair of the portion of the public highway over which the continuance of such travel is permitted, the person sustaining the same may recover in a proper case against the county. *King v. Douglas County*, 114 Neb. 477.

"A county cannot evade statutory liability for damages arising out of an obstruction in a highway by a plea that the repair of such highway at the point where the injury occurred has been delegated to another." *Frickel v. Lancaster County*, 115 Neb. 506.

"The liability of the county arises, not alone from the *constructing*, but as well from the *maintaining* of a bridge." *Higgins v. Garfield County*, 107 Neb. 482.

"One who is injured by reason of a defective bridge while riding in a private vehicle may recover from a county otherwise liable, notwithstanding the negligence of the driver, which may have contributed to produce the injury, the injured party being free from negligence and having no authority or control over the driver." *Loso v. Lancaster County*, 77 Neb. 466.

I have tried to trace the history of this law and of the decisions of this court, and show what an incongruous situation has arisen, whereby this court has repeatedly required counties to defend against such damage actions, and to pay judgments secured against them, whenever that particular county happened to be under the commissioner system, and has repeatedly upheld instructed verdicts in favor of one of the 27 counties still under the township system. Why should such an inconsistency be longer tolerated? I have tried to show that, at its inception in 1889, the act, of which section 39-832, Comp. St. 1929, was a part, specifically applied to counties under township organization, and it is clearly an error to allow counties so organized to now escape a liability which all other counties must face.

In the case at bar, the evidence shows that Butler county had built the new bridge over this swale, which was completed to take the place of this old one which had been taken out by the county, leaving a death trap, with no barricades, lights, or warning, on a well-traveled country road, which was being widened and raised under a contract made by the county, to be paid for by the county. The county should be required to defend this suit.

ANNA KLANECKY, APPELLANT, V. WOODMEN OF THE WORLD, APPELLEE.

FILED APRIL 27, 1934. No. 28923.

1. **Estoppel.** "Waiver is an intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it." *Livesey v. Omaha Hotel Co.*, 5 Neb. 50.
2. **Insurance: FORFEITURE: WAIVER.** An offer by a fraternal benefit society to a suspended member, to permit his reinstatement on conditions stated, does not operate to waive a forfeiture of the benefit certificate where there was no compliance with the conditions named.
3. ———: ———: ———. Forfeiture of a benefit certificate is not waived by the fact that the benefit society has mailed blanks for proof of death to the local camp of the society where, before such blanks are received and filled out, the society informs the beneficiary that the certificate is void and the mailing of the blanks was an error.
4. ———: ———: ———. A letter by a fraternal benefit society, reciting that blanks for proof of death have been sent to the financial secretary of the local camp of the fraternal order, to which a deceased member had once belonged, but who had died while suspended, will not operate to waive a forfeiture of a benefit certificate where the letter of transmittal recites that the right of approval of proof is reserved to the society.

APPEAL from the district court for Valley county: RALPH R. HORTH, JUDGE. *Affirmed.*

Davis & Vogeltanz, for appellant.

Munn & Norman, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and MESSMORE, District Judge.

GOOD, J.

This is an action on a fraternal benefit certificate. At the conclusion of plaintiff's testimony there was a directed verdict for defendant and judgment thereon, from which plaintiff has appealed.

Plaintiff alleged the issuance of the certificate and that

Joseph Klanecky died while a member of the order in good standing, and alleged that defendant had refused and neglected to furnish the necessary blanks for making proof of death; that plaintiff had substantially complied with the conditions entitling her to recover and that defendant had waived further compliance with its by-laws and rules. Defendant answered and, as a defense, alleged that Klanecky had been suspended for nonpayment of dues and assessments, and particularly for the assessment due February 1, 1930, was suspended March 1, 1930, and never made any payments thereafter, and that Klanecky was not a member of the order at the time of his demise.

The following facts are disclosed by the record: Joseph Klanecky became a member of the defendant society in April, 1897. A benefit certificate was issued to him in which his then wife was named as beneficiary. Later she died; he remarried, and in 1922 a new certificate was issued, in lieu of the old, in which his second wife, the plaintiff, was named as beneficiary. He paid the assessments as they became due until February, 1930. He was entitled to the whole of that month in which to pay the February assessment, but, under the terms of the certificate, he became suspended from membership on March 1, 1930, for failure to pay the February, 1930, assessment. He made no payments thereafter and died May 4, 1931. No proof of death was ever furnished the defendant. Plaintiff contends, however, that no proof was necessary because of the subsequent action of defendant in denying any liability.

Plaintiff also contends that defendant waived any forfeiture of the certificate for nonpayment of assessments and dues, and relies upon certain letters to constitute such waiver. The first of the letters relied on is a form letter, dated October 26, 1931, and reads as follows:

"Personally from W. A. Fraser to member addressed.

"Esteemed Sovereign:

"My attention has just been called to the fact that you have been suspended on the records of your Camp for

more than six months. Ordinarily this long period of suspension would sever your connection with the association. However, realizing that protection for your family and dependents is more essential in this time of economic stress than it ever was, I am sure that you will give special attention to the privilege extended in the following paragraph, which is accorded for the time being only.

"You are urgently invited to pay at once to the financial secretary of your Camp the instalment due for the current month. It will not be necessary for you to pay the arrearages on your certificate at this time. In order to help you to carry your insurance we will charge the amount of the arrearages against your certificate with interest at five per cent. You can repay the amount so charged at any time in whole or in part, or you may allow it to continue as a charge against your certificate indefinitely. It is, of course, understood that in the event of your death the amount charged against your certificate will be deducted from the amount paid to your beneficiary. But, as all our policies held by members who have been in the society for more than two years are paid for more than their face value, the chances are that your beneficiary would receive the full face of the certificate after deducting the amount you owe or probably would receive even more than the face of the certificate after the deduction is made.

"In order to take advantage of this invitation please sign the inclosed application and deliver it to the financial secretary of your Camp, paying to him at the time your regular monthly rate covering the current instalment—and do it Now.

"Truly and fraternally yours,
"W. A. Fraser, President."

It is apparent that the society had not been informed of the death of Mr. Klanecky when this form letter was mailed. Shortly thereafter a letter from a firm of attorneys, presumably representing the plaintiff, was mailed to defendant. That letter, however, is not in the record.

Then followed another letter, directed to these attorneys, which, omitting formal parts, is as follows:

"November 9, 1931.

"Joseph Klanecky, Deceased.

"Gentlemen:

"We are in receipt of your communication of November 2d giving notice of the death of the above named and wish to advise that, in accordance with our usual custom, we have forwarded the necessary blanks for making proof of this death to the financial secretary of the Camp of which the deceased was formerly a member. Upon their return to this office completely executed together with the beneficiary certificate or policy of the deceased, the matter will then be presented to our approving authorities for consideration.

"Yours very truly,

"Claim Department,

"By L. A. Roscoe."

Apparently there was another letter from the same firm of attorneys, directed to defendant, and another letter was mailed to the same attorneys in answer, which, omitting formal parts, is as follows:

"December 9, 1931.

"Jos. Klanecky, Deceased.

"Gentlemen:

"Replying to your letter of December 1st, we have to advise you that our letter of November 9th was in error and that the certificate held by the above named decedent became null and void on March 1, 1930, when he became suspended under the provisions of the constitution, laws and by-laws of the association by reason of the nonpayment of the February, 1930, instalment of the then current annual assessment on said beneficiary certificate. Said certificate was accordingly not in force at the time of his death on May 4, 1931, and there is no death benefit payable thereunder.

"The former certificate held by the deceased contains no provision whatever for the payment of dues and as-

sessments by the association in case they are not paid by the member, but on the contrary the certificate and the constitution, laws and by-laws of the association provide that, if the member fails to pay any monthly instalments of his annual assessment on or before the last day of the month, he thereby becomes suspended from membership in the association, and his beneficiary certificate becomes null and void.

"Yours very truly,
"Claim Department,
"By J. M. Sturdevant."

"Waiver is an intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it." *Livesey v. Omaha Hotel Co.*, 5 Neb. 50. See, also, *Summers v. Automobile Ins. Co.*, 119 Neb. 625.

It is apparent that the form letter, signed by defendant's president, was merely an offer to suspended members to permit them to be reinstated on the conditions named in the letter. More than 17 months previously Klanecky had departed this life and could not comply with the conditions. It is evident also that the defendant society was then without knowledge of Klanecky's death. In any event, this form letter can constitute no waiver, and could not operate to reinstate to membership one who had been dead for 17 months and who had been properly suspended for more than a year prior to his death. *Novak v. LaFayette Life Ins. Co.*, 106 Neb. 417.

The benefit certificate and by-laws of the defendant society provide that if the dues and assessments levied against the member are not paid, as required by the constitution and by-laws, the certificate shall be null and void and so continue until payment is made in accordance with the by-laws. There is a further provision that the member shall have the full month in which to pay the assessment for that month. There is a provision for reinstatement of the member if he makes payment of his dues and assessments at any time within three months, but, as a

condition precedent to reinstatement, he must give a written statement and warranty, signed by himself, stating that he is in good health, and other matters which we need not consider. There is still another provision for reinstatement at any time before the expiration of six months upon certain conditions named, and it is further provided that if a member be delinquent for more than six months he cannot be reinstated, but may, on surrendering his certificate, make application as a new member, subject to all the conditions of new applicants, except introduction. For eight months previous to his death Klanecky was not eligible to reinstatement, except on condition of surrendering his certificate and making application as a new member.

But plaintiff contends that all of these provisions are for the benefit of the society and may be waived, and that sending out blank proofs of death and inviting the plaintiff to incur expense in making out proofs constitute a waiver and has the effect of reinstating to membership one who is not even eligible to membership, except on surrendering his certificate and making application as a new member.

Plaintiff cites and relies upon the opinions of this court in *Soehner v. Grand Lodge, Order of Sons of Herman,* 74 Neb. 399, *Home Fire Ins. Co. v. Kennedy,* 47 Neb. 138, *Home Fire Ins. Co. v. Phelps,* 51 Neb. 623, *Dodder v. Pacific Mutual Life Ins. Co.,* 104 Neb. 74, and upon the case of *Noem v. Equitable Life Ins. Co.,* 37 S. Dak. 176. The facts in the Nebraska cases are so radically different that we think they are not authority for the contention made by plaintiff.

In *Soehner v. Grand Lodge, Order of Sons of Herman, supra,* the secretary of the local lodge solicited Soehner to pay his back dues and assessments on various occasions. Soehner paid the back dues and assessments to the local secretary of his lodge and received a receipt therefor, and thereafter died. It was held that the local secretary was the agent of the grand lodge and the re-

ceiving of these payments after suspension had the effect of reinstating the member in good standing.

Home Fire Ins. Co. v. Kennedy, supra, was an action on a fire insurance policy. With full knowledge of the facts that would constitute a forfeiture of the policy, the defendant company demanded proofs of loss and on several different occasions made repeated demands for additional proofs of loss, and demanded that the claim be submitted to arbitration. It was properly held that these acts constituted a waiver of the rights of the company to insist upon a forfeiture.

Home Fire Ins. Co. v. Phelps, supra, was an action on a fire insurance policy. The defense was that the insurance was void because the premises had become vacant without consent for vacancy having been indorsed on the policy. It was shown that, with full knowledge of the vacancy and conditions that would have permitted the company to avoid the policy, it treated the policy as in full force, demanded proofs of loss and additional proofs of loss and tendered a compromise settlement. It was there held that these acts continued the policy in full force and constituted a waiver.

In *Dodder v. Pacific Mutual Life Ins. Co., supra,* it was held: "If the insurance company at all times throughout the negotiations denies liability, and sends blanks to make proof of loss, subject however to its plenary rights to make whatever defense it may have, then there is no waiver of any defense it may have." Certainly, this does not sustain plaintiff's contention.

With reference to the case of *Noem v. Equitable Life Ins. Co., supra,* apparently it sustains the contention made by plaintiff. However, we think that case is in conflict with the decisions of our own court, and we are required to follow the opinions of this court, rather than those of the courts of a sister state.

In *Novak v. LaFayette Life Ins. Co., supra,* this court held: "A provision in a life insurance policy, providing that it should become null and void upon failure to pay

premiums when due, is not illegal, and where there is default in the payment of premiums, and no act or circumstance constituting a waiver or estoppel on the part of the company, preventing it from insisting upon a forfeiture, the contract will be enforced as it was made. * * *

"A notice to the insured that such a premium note has become due and is not paid, and an offer to allow for an arrangement for him to pay it and avoid forfeiture, without any other act on the part of the company displaying an attitude to compel its payment or to insist upon the right to enforce it, are insufficient to estop the company from claiming a forfeiture of the policy by reason of the previous default."

In *Cady v. Travelers Ins. Co.*, 93 Neb. 634, this court held: "A notice sent by an agent of a life insurance company to the assured that the premium on his policy of insurance is past due and unpaid, with a request for its payment, without more, payment being refused, did not change the terms of the contract with respect to the date of its conversion into a paid-up policy of term insurance."

In *Swett v. Antelope County Farmers Mutual Ins. Co.*, 91 Neb. 561, it was held: "The making, and demand for payment, by a mutual insurance company, of an assessment upon a policy of insurance, subsequent to a loss under such policy, will not be held to be a waiver of its terms, in the absence of a plea and proof of payment by the assured of such assessment."

That Klanecky was not a member of the order at the time of his death is clear. Neither the form letter nor the one advising the attorneys that blanks to make proof of death had been sent to the financial secretary of the camp of which the deceased had formerly been a member was sufficient to constitute a waiver. In fact, plaintiff pleads that defendant neglected and refused to furnish blanks, but even in that letter the right to determine whether the claim was one for approval or otherwise was reserved, even had the blanks been sent and acted upon

by the plaintiff. However, they were not received and acted upon by the plaintiff.

Since there was no right of plaintiff to recover in this action, the trial court very properly directed a verdict for the defendant.

The judgment of the district court is right and is

AFFIRMED.

CLIFFORD D. MARSHALL, APPELLEE, V. EDWARD W. ROWE ET AL., APPELLANTS.

FILED APRIL 27, 1934. No. 28952.

1. **Discovery.** The provisions of our Civil Code not only in express terms abolish bills of equity with discovery as an incident thereto, but by requirements as to petitions and answers effectively prevent the incorporation of the essential elements upon which discovery, as it formerly existed prior to the adoption of our reformed procedure, was based.
2. *Graver v. Faurot*, 76 Fed. 257, and *Guild v. Phillips*, 44 Fed. 461, examined and construed.
3. **Pleading:** ANSWER. According to the weight of authority, an answer is a pleading, the purpose of which is to notify the court and the plaintiff of the defense relied upon so that the latter may be prepared to meet it.
4. ———: GENERAL DENIAL. A general denial is permissible if the defendant *bona fide* challenges a single element of those essential to plaintiff's recovery. It will not be interpreted as a response to a "search of the conscience of the defendant," and does not possess the character of evidence. Its sole effect is to put plaintiff to proof of the allegations of his pleading.
5. ———. The provisions of the Code pertaining to compulsory discovery by the parties to the action do not relate to the subject of pleadings.
6. **Attorney and Client.** The rule in this jurisdiction is that knowledge of a client's attorney is attributable to and binds the client, where such attorney is acting regularly in good faith in that capacity for his client.
7. **Notice.** Where one is put upon inquiry, he is to be charged with notice of all such facts as he would have learned by reasonable inquiry.

8. **Limitation of Actions.** Our Code provides that civil actions can only be commenced within four years for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud. Comp. St. 1929 sec. 20-207.
9. ———. Evidence examined, and *held* that, within the intendment of the provisions of the statute just referred to, the plaintiff discovered the fraud involved in this transaction not later than January 29, 1920, entered into the compromise agreement with knowledge of the facts, and thus his action is barred by the terms of this statute.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Reversed, with directions.*

Cleary, Suhr & Davis and *John J. Ledwith,* for appellants.

Prince & Prince, Winfield M. Elmen, Marcus L. Poteet and *Walton B. Roberts, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

EBERLY, J.

This proceeding presents separate appeals by Edward W. Rowe and Benjamin R. McGrath from a decree in equity setting aside a satisfaction of judgment, which judgment was made and entered on April 28, 1915, against the appellants jointly and in favor of Clifford D. Marshall, and reviving the original judgment. This "satisfaction of judgment," thus canceled, is in writing, was executed by Clifford D. Marshall and acknowledged by him on November 26, 1920, and was filed in the office of the clerk of the district court for Lancaster county on December 1, 1920. In consideration of $1,500 received, this satisfaction of judgment by its terms releases and forever discharges the defendants from any liability for or on account of said judgment, and expressly accepts the said sum in full satisfaction of said judgment, interest and costs.

The history of this litigation may be summarized as follows: The original judgment was entered in the dis-

trict court for Lancaster county, Nebraska, in favor of appellee and against the appellants in an action for malpractice as physicians, for the sum of $2,000 and $170 costs of suit. From this judgment an appeal was prosecuted to this court, where it was affirmed on April 2, 1917. On April 26, 1917, an execution was issued thereon out of the district court for Lancaster county to the county sheriff and returned "wholly unsatisfied." On April 27, 1917, a proper transcript of this judgment as entered in Lancaster county was filed in the office of the clerk of the district court for Hall county, that being the county of the then residence of Dr. McGrath, defendant, and an execution was issued thereon by the proper officer to the sheriff of Hall county, and thereafter on May 7, 1917, said execution was by the sheriff of Hall county returned "wholly unsatisfied." On May 8, 1917, Clifford D. Marshall commenced a proceeding in equity in the district court for Hall county, in the nature of a creditor's bill. The petition in equity then filed therein by plaintiff embraced twelve numbered paragraphs, in which, among other allegations usual to creditors' bills, it was charged that on June 1, 1914, while the action was pending against him in the district court for Lancaster county in which the judgment referred to was ultimately entered, Benjamin R. McGrath purchased the southwest quarter of section 4, township 10 north, range 11, west of the 6th P. M. in Hall county, Nebraska, for and in consideration of $16,000, and had the fee title conveyed to his wife, Susan E. McGrath, and that McGrath paid the sum of $12,000, and that his wife paid no part thereof; and further set out at length positive and detailed allegations disclosing that McGrath was the real owner thereof, and that this conveyance was so made for the express purpose of hindering, delaying and defrauding McGrath's creditors of whom such plaintiff was one, and which it is alleged was "in furtherance of the scheme and design on the part of the said Benjamin R. McGrath to cover up and conceal his property, and particularly said premises, from this plaintiff, for the purpose of avoiding

the collection of said judgment; and plaintiff alleges that said premises actually are owned by, and belong to, said Benjamin R. McGrath." This petition, duly verified, closes with an appropriate prayer that the ownership of the land may be determined as alleged, and that the premises be decreed to be sold and the judgment satisfied from the proceeds thereof. It appears also that a notice of *lis pendens* was filed in connection with the petition.

To this petition on July 10, 1919, McGrath filed his answer, in the following words: "Now comes the defendant, Benjamin R. McGrath, and in answer to the petition of the plaintiff filed herein denies each and every allegation in said petition contained." It was thereafter verified by him under oath in the following language: "That he has read the same, knows the contents thereof, and that the facts stated therein are true as he verily believes."

As a part of said proceeding the deposition of one Anna Blanchard was taken, in the course of which an original letter from Mrs. Benjamin R. McGrath, the doctor's wife, also two letters of the cashier of the bank of which Dr. McGrath was a patron, and one from Dr. McGrath himself were produced, identified, and attached to the deposition so taken as a part thereof. Each of these letters tended in a substantial degree to establish the truth of plaintiff's contention as to the true ownership of the land then in suit. The following is a copy of Dr. McGrath's letter, above referred to:

"B. R. McGrath, M. D. 111½ West Third Street, Grand Island, Nebr. October 2, 1914. Stull Brothers, Omaha, Nebr. Gentlemen: I am inclosing my check for one-hundred-ten dollars in payment of interest coupon now due on the note of Charles J. S. Trout. I have bought the land (S. W. ¼, 4-10-11) upon which mortgage was given to secure this note. Please send the coupon to me. Respectfully, B. R. McGrath."

This deposition, including these letters referred to, was filed in the cause in the office of the clerk of the district court for Hall county on February 7, 1920.

On March 28, 1918, garnishment proceedings were commenced by plaintiff Marshall against Susan E. McGrath and the First National Bank of Grand Island, Nebraska, and service of summons in garnishment was made upon the parties named. On June 3, 1918, the proceedings were dismissed as to the bank. The record discloses no examination of Susan E. McGrath. There was also a motion filed on October 20, 1919, for an examination of Dr. McGrath under the provisions of the statute, now section 20-1566, Comp. St. 1929. It affirmatively appears that no examination of Dr. McGrath was had, nor were there any examinations of the garnishees. But thereafter an agreement of settlement of the entire controversy was entered into between Marshall and two doctors. Pursuant to this settlement the doctors paid to Marshall the sum of $1,500 in cash, each contributing one-half of such amount. Marshall accepted this sum and thereupon, pursuant to his application, on November 27, 1920, there was entered in this cause in the district court for Hall county the following order: "Now on this day this cause came on for hearing, and upon application, this case is dismissed with prejudice, at plaintiff's costs, and *lis pendens* released." In addition to this, and as a part of the same transaction, there was duly filed in the district court for Lancaster county on December 1, 1920, the "satisfaction of judgment" which by the order appealed from was canceled.

The record further discloses that Susan E. McGrath died on June 9, 1925, and at the time of her death she was the owner of the record title in fee simple of certain real estate, a portion of which was situated in Hall county, Nebraska; that on July 28, 1926, Dr. McGrath commenced an action against the children of his deceased wife, who, with himself, constituted her sole heirs, the purpose of which was to secure a decree determining that he was the sole owner of the real property described therein, of which Susan E. McGrath died seised. On August 20, 1926, in the trial of this proceeding, Dr. McGrath testi-

fied, in substance, that he had purchased in 1914, and out of his own funds paid for, the southwest quarter of section 4, township 10 north, range 11; that he had by agreement with his wife caused the title to be conveyed to her as "a protection that doctors frequently use on account of the frequency of damage suits;" that this land was sold in 1921 and the proceeds thereof invested in lands, the title to which was vested in his deceased wife for the same purpose, and that Dr. McGrath was at all times the real and true owner thereof. At the conclusion of the cause on August 31, 1926, a decree was entered quieting the title to the lands in controversy in Dr. McGrath as prayed.

The disclosures made by Dr. McGrath in this proceeding were a signal for renewed activity on the part of plaintiff herein. On December 9, 1926, there was filed in the district court for Hall county, Nebraska, a petition in equity in which Clifford D. Marshall was plaintiff and Benjamin R. McGrath was defendant. The first twelve paragraphs of this petition were substantially identical with the allegations contained in the petition in equity filed by plaintiff in the district court for Hall county on May 8, 1917, hereinbefore referred to, and which were appropriate to a creditor's bill. In addition this petition contained further allegations which may be briefly summarized as follows: That in said proceeding said Benjamin R. McGrath on July 10, 1919, filed a duly verified answer denying each and every allegation contained in the plaintiff's petition; that Benjamin R. McGrath, in a proceeding instituted under the statute in aid of execution, under oath, had denied the ownership of the real estate involved therein; that these statements were false; that plaintiff was unable to disprove these false and fraudulent statements, but was compelled thereby to accept the terms of the settlement, and released the original judgment and the other proceeding then being carried on to enforce the same; that plaintiff was unable to disprove such fraudulent statements until Dr. McGrath had testified on August 30, 1926. This petition closes with an appropriate prayer.

It further appears that the defendant McGrath demurred to this pleading on six grounds, the sixth of which was: "That the petition does not state facts sufficient to constitute a cause of action against the defendant."

On September 12, 1928, the following order was entered in the cause (omitting title): "Now on this day the demurrer heretofore heard on March 21, 1928, came on for hearing in open court, and said demurrer is hereby sustained, to which the plaintiff excepts, and elects to stand on demurrer." It is also conceded that no appeal was ever taken from this judgment, and that it remains in full force and effect.

The prayer of the amended petition, to which the demurrer was sustained, included the following: "Plaintiff prays that the releases hereinbefore set forth may be set aside; that the dismissal of the creditor's bill may be set aside and said writ reinstated; that the judgment hereinbefore referred to may be reinstated, revived, and held to be a lien on (premises described); that said alleged settlement, dismissals and cancelation may be set aside and held for naught; that the defendant may have credit for the amount paid; * * * and that the real estate described * * * may be subjected to the balance remaining unpaid," and for general relief.

Thereafter on September 24, 1928, the plaintiff filed in the original case of Marshall v. Edward W. Rowe and Benjamin R. McGrath in the district court for Lancaster county, Nebraska, a verified application to set aside the satisfaction of judgment filed therein on December 1, 1920. To this application the defendants separately demurred, and these demurrers were sustained by the district court, and the proceeding dimissed. On appeal to this court the action of the trial court was reversed. See *Marshall v. Rowe,* 119 Neb. 591, to which reference is made for a resumé of the allegations of the pleading then involved.

The proceedings now presented to this tribunal, based on and including the motion to set aside the satisfaction of judgment and the petition in equity filed in the district

court subsequent to the remand from the supreme court, were consolidated in the district court. Separate answers of the defendants were filed to these consolidated pleadings and issues were finally made up by the filing of plaintiff's reply. Over 100 pages of the transcript are devoted to the pleadings in the district court for Lancaster county which formed the issues of the present trial. To abstract them so as to fairly disclose all the issues joined would unduly extend this opinion. A trial on the merits resulted in a decree for the plaintiff, as already set out herein, and defendants appeal.

Without passing on the validity of certain technical defenses presented by the defendants, two issues may be taken as controlling on this review, viz., fraud, and the statute of limitations. Appellee's position on this subject fairly appears in the following excerpt from pages 4 and 5 of his brief: "Our theory of the case is that the judgment of the supreme court was something more than a scrap of paper. It meant a positive order to McGrath to pay that judgment; that, when the supreme court made that order and an execution was issued, McGrath owed an affirmative and positive duty to disclose immediately that he owned the property in question; that, when a creditor's bill was filed, the appellant, Benjamin R. McGrath, had no right to file a general denial and compel Marshall to dig out the facts. Instead, it was McGrath's duty to come into court and disclose the facts."

Futhermore, appellee asserts that this general denial thus filed by McGrath in 1919 was a positive and actual fraud, and was an additional or a new fraud distinct from that against which relief in the original creditor's bill was sought and by means of which the settlement was made, which resulted in the execution of the satisfaction of judgment which the decree appealed from canceled and set aside. In support of this contention there is cited *Graver v. Faurot*, 76 Fed. 257, and *Guild v. Phillips*, 44 Fed. 461, as approved in *Munro v. Callahan*, 55 Neb. 75, as sustaining it and controlling.

We are unable to accept the conclusion thus urged by appellee, either as to the affirmative legal duty of McGrath to disclose, or the effect of the general denial filed by him. We are convinced that this contention on part of plaintiff is not sustained by the precedents cited in support thereof in his brief, and involves an erroneous interpretation of the controlling principles involved in the transaction.

Plaintiff's claims are fundamentally predicated upon the doctrine announced in *Graver v. Faurot,* 76 Fed. 257, and *Guild v. Phillips,* 44 Fed. 461. The scope and effect of these decisions are to be determined in the light of the procedure they exemplify. This harks back to the days of the common law when under its inflexible rules parties to an action were incompetent as witnesses. In course of time it appears there was developed in the chancery courts a system of pleading which among its remedies included bills in equity involving a compulsory discovery on part of the defendant by means of an answer under oath. Two classes were recognized, viz.: One of which involved the discovery of facts resting in the knowledge of defendant and seeking no relief in consequence of such discovery, but seeking discovery merely in aid of some other proceeding either at law or in equity pending or about to be brought. The other form, while a bill for relief and discovery incidental thereto, withdrew the case from the legal forum and brought it for decision before a court of equity. It may, however, be said in passing that under the former practice the same principles governed "discovery" whether the right thereto was invoked in aid of other issues involved in an equity suit or in aid of an action at law. 18 C. J. 1057.

Prior to our reformed Code procedure, bills in chancery as employed to secure discovery, either as the primary relief sought or as incidental to sustain other issues in the suit wherein discovery was sought, necessitated the employment of a highly technical, complex and artificial form of allegation, according to which in the approved manner was set forth facts on which plaintiff's claim for relief

was based. This pleading ordinarily embraced nine essential and distinct elements or parts. Three of these essentials were "the stating part," "the interrogative part," and "the prayer for relief." The general interrogative part of the bill specified the scope and extent of the information required, and as to it, if oath was not waived by plaintiff, the defendant was expressly required to make full disclosure as to the whole subject-matter, and in addition it became customary to insert specific questions as to which plaintiff particularly desired discovery. Adams, Equity (8th ed.) 307. But, "Where the bill is one for both relief and discovery, a waiver of answer under oath is a waiver of the right to discovery, and an answer giving discovery cannot be compelled." 18 C. J. 1069.

It may also be noted that the rule governing this practice in federal courts, which prevailed at the time the two cases heretofore cited were decided, was declared to be as follows: "The 41st, 42d, and 43d rules make the interrogatories a part of the bill, and prescribe its form; and the 40th rule declares that 'a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer,'—which must be specified in a note at the foot of the bill, in the form stated." *Wilson v. Stolley*, 4 McLean (U. S. C. C.) 272. See, also, *Treadwell v. Cleaveland*, 3 McLean (U. S. C. C.) 283.

Omitting consideration of the various steps in equity pleading, as that procedure formerly prevailed, it may be said that when the defendant finally joined issue by his answer he was required therein, within the scope as fixed by the interrogative part of the bill including special interrogatories made a part thereof, to answer fully, admit or deny all facts stated therein with all material circumstances connected therewith. Unless waived by the plaintiff, this answer was required to be made under the positive oath of the defendant. By proper exceptions presented

to the chancellor the plaintiff was enabled to compel full disclosures and also to restrict the disclosures to the scope as prescribed by the interrogative part of the bill. The importance of this right to limit the answers of the defendant may be realized, when we remember that the defendant's answer thus made was more than a mere pleading. Limited to the special class of answers here under consideration, it may be said to have a twofold function, viz.: "First, to afford the information required by the plaintiff's interrogatories; and, secondly, to state the defendant's ground of defense to the plaintiff's charges." 1 Whitehouse, Equity Practice, 447.

The answer of the defendant, positively sworn to, to a bill filed against him upon a matter stated in the bill and responsive to it is evidence in his own favor, unless it is overcome by the satisfactory testimony of two opposing witnesses or of a witness corroborated by other circumstances which give to it a greater weight than the answer or which is equivalent in weight to a second witness. 4 Elliott, Evidence, 529; 1 Ency. of Evidence, 906-910; 1 Greenleaf, Evidence (13th ed.) 303; *O'Brian v. Fry,* 82 Ill. 274; *Hurd v. Ascherman,* 117 Ill. 501.

Indeed, a bill without an interrogative part, or interrogatories made a part thereof, was formerly in equity deemed insufficient. *Ball v. Sawyer,* 62 Vt. 367, 370; *Johnson v. Mundy,* 123 Va. 730; *Excelsior Wooden Pipe Co. v. City of Seattle,* 117 Fed. 140, 144.

It was also clearly the rule that beyond the scope of the general and special interrogatories as set forth in the bill the defendant had no duty to disclose, and that a plaintiff was not entitled to a discovery of defendant's case. *Hoffman v. Postill,* 4 Ch. App. Cas. (Eng.) 673.

The two cardinal rules in the law of discovery are: "First, the right, as a general proposition, of every plaintiff to a discovery of the evidences which relate to his case; and, secondly, the privilege of every defendant to withhold a discovery of the evidences which exclusively relate to his own." *Lyell v. Kennedy,* 8 App. Cas. (Eng.)

217, 224 (quoting from Wigram, Law of Discovery [1842] 14). See, also, *Kelley v. Boettcher*, 85 Fed. 55.

The cases of *Graver v. Faurot*, 76 Fed. 257, and *Guild v. Phillips*, 44 Fed. 461, exemplify the equitable procedure just discussed. Both involved on part of the respective plaintiffs the exercise of the right of discovery, under common-law procedure which has been hereinbefore substantially outlined, the limits of which were necessarily prescribed in the interrogative parts of the original bill filed in each case. The reports of these decisions before us emphasize the fact that in each case the defendant answered under oath and the substance of the answers thus made is given. Such answers, as we have seen, then stood, not alone as pleadings, but as testimony of a controlling nature. The conclusion thus finds abundant support. On the basis of this testimony, *Graver v. Faurot, supra,* was actually decided; and in *Guild v. Phillips, supra,* a consent decree was rendered because of the presence thereof. It will be remembered in this connection that, under the former practice, "the purpose of authorizing interrogatories was to enable the court to make a summary disposition of a cause by applying the law to an admitted state of facts." *Bronk v. Charles H. Scott Co.*, 211 Fed. 338, 340. So, in both cases now under consideration, the equivalent of perjured evidence entered into the disposition of the questions involved, and the judicial determinations made were based thereon; and likewise it is on the basis of perjured evidence (not sham pleading) that *Munro v. Callahan*, 55 Neb. 75, and the other Nebraska cases cited by plaintiff on the present question were decided. However, in the instant case no perjured evidence on part of the defendant appears in the record. Hence, perjured evidence could not have entered into or influenced the basic agreement of compromise of the parties. Therefore these federal cases and the Nebraska decisions following the same are not here in point.

Even if it be assumed that the case before us is within

the scope of section 901 of the Civil Code (Comp. St. 1929, sec. 20-2225) and, as such, that "the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice," it affords the plaintiff no assistance. Tested by the controlling principles of that procedure which prevailed prior to the adoption of the Code, the petition of May 8, 1917, is absolutely barren of allegations essential to an interrogative part of a proper bill in equity, both in body and in the prayer, and entitled the plaintiff to no disclosures whatever. The answer thereto, a general denial, likewise tested by the same criterion, so far as its evidential character was concerned, was wholly insufficient because of nondisclosive nature, and the failure to attach a positive verification. If accorded any function, this general denial would amount to no more than a defensive pleading, and not a discovery of evidence. 1 Whitehouse, Equity Practice, 448. This would not bring the present case within the doctrine of *Graver v. Faurot, supra,* or *Guild v. Phillips, supra,* or within the reasoning of the Nebraska cases that cite and rely on the *Graver* and *Guild* cases as precedents.

Nor are plaintiff's contentions referred to aided when tested in the light of the provisions of our Civil Code. The second paragraph of this enactment provides: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and in their place there shall be hereafter but one form of action, which shall be called a 'civil action.'" Comp. St. 1929, sec. 20-101.

Section 90 of our Civil Code is as follows: "The rules of pleading formerly existing in civil actions are abolished and hereafter the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code." Comp. St. 1929, sec. 20-802.

Section 91 limits the initial pleading on behalf of plaintiff to a petition (Comp. St. 1929, sec. 20-803) and it is further provided by section 92 that the petition "must

contain * * * a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition." Comp. St. 1929, sec. 20-804.

Section 99 of this Civil Code provides, as to answers: "The answer shall contain: First. A general or specific denial of each material allegation of the petition controverted by the defendant. Second. A statement of any new matter constituting a defense, counterclaim or set-off, in ordinary and concise language, and without repetition." Comp. St. 1929, sec. 20-811.

These provisions not only in express terms abolish bills in equity with discovery as an incident thereto as formerly approved, but by specifications as to the nature of the statements properly to be incorporated in petitions effectively prevent the incorporation of the essential elements upon which the right of discovery as it formerly existed was based. In addition, section 20-824, Comp. St. 1929, provides expressly that an answer verified under the Code shall not be used "against a party in any criminal prosecution or action * * * as proof of a fact admitted or alleged in such pleading; and such verification shall not make other or greater proof necessary on the side of the adverse party, provided that allegations or denials made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the court, as may have been necessarily incurred by the other party by reason of such untrue pleading." So, also, a verification of a pleading is sufficient if it states that affiant believes the facts stated in the petition to be true. Comp. St. 1929, sec. 20-827; *Harden v. Atchison & N. R. R.*, 4 Neb. 521.

It appears that our Civil Code by these provisions has, as to causes of action pleaded and carried on in strict conformity therewith, effectually abolished bills of equity with discovery as incidental thereto, and that answers, save and except so far as statements therein may involve admissions against interest, have by the terms thereof been wholly deprived of the characteristics of evidence,

which they were accorded by the equity practice superseded. "In some of the states a suit for discovery, properly so called, is expressly abolished by statute, and in all of them is utterly inconsistent with both the fundamental theory and with the particular doctrines and methods of the reformed procedure." *Wright v. Superior Court,* 139 Cal. 469, 472. See, also, *Turnbull v. Crick,* 63 Minn. 91; *Leuthold v. Fairchild,* 35 Minn. 99; *Vogelsong v. St. Louis Wood Fibre Plaster Co.,* 147 Mo. App. 578; *Strudwick v. Brodnax,* 83 N. Car. 401; *Love v. Keowne,* 58 Tex. 191; *Whereatt v. Ellis,* 65 Wis. 639; *Cleveland v. Burnham,* 60 Wis. 16; *United States Tire Co. v. Keystone Tire Sales Co.,* 153 S. Car. 56.

According to the weight of authority, an answer is a pleading, the purpose of which is to notify the court and the plaintiff of the defense relied upon so that the latter may be prepared to meet it. 1 Bancroft, Code Pleading, sec. 229. "Originally, to 'defend,' in the law of pleading, imported simply a denial of that which constituted the basis of the plaintiff's claim, as alleged in his pleading." *First State Bank of Hazen v. Radke,* 51 N. Dak. 246.

Our Code accords to the defendant the right to require the plaintiff to establish by proof all the material facts necessary to show his right of recovery. Plaintiff's pleadings under the Code do not reach the defendant's conscience as was formerly the result of bills of equity under the chancery practice. Pomeroy, Code Remedies (5th ed.) sec. 561; 1 Bancroft, Code Pleading, sec. 233; *Keens v. Robertson,* 46 Neb. 837; *Phenix Ins. Co. v. Bachelder,* 39 Neb. 95; *Walton Plow Co. v. Campbell,* 35 Neb. 173. It appears that a general denial is proper where the defendant *bona fide* challenges a single element of those essential to plaintiff's recovery *(Upton v. Kennedy,* 36 Neb. 66); and that this pleading under the theory of our Code will not be interpreted as a response to a search of the conscience of the defendant in the manner required under the former practice in equity through the agency of bills in equity with discovery as an incident thereto.

The fundamental reason which supports this construction of our Code provisions is to be found in its provisions, where (1) the incompetency of parties to the action to testify has largely been removed, and the deposition of the defendant covering all facts in issue in any particular litigation may be secured by the plaintiff prior to trial (*Kansas City, W. & N. W. R. Co. v. Conlee*, 43 Neb. 121; *In re Hammond*, 83 Neb. 636); (2) provisions enabling the plaintiff to secure the production of all papers in defendant's possession or control relating to, and necessary for, the proper determination of the issues made by the pleading (Comp. St. 1929, secs. 20-1267 to 20-1273); (3) provisions which permit the defendant in creditors' suits to be examined in aid of execution (Comp. St. 1929, secs. 20-1566, 20-1567). In view of these statutory enactments it becomes obvious that the reasons which necessitated the former equity practice have passed away. It follows that, considered in and of itself, the filing of a verified general denial by Dr. McGrath to the petition of the plaintiff in 1919 was the exercise of a right accorded him by statute to put plaintiff to his proof, and was not the commission of a fraudulent act, for he then owed no legal duty of disclosure to plaintiff as a matter of pleading.

It appears from the record that the settlement upon which the "satisfaction of judgment" in suit was based was the result of the efforts of the representatives of both Dr. McGrath and Dr. Rowe. Neither of the doctors personally took active part in the negotiations that led up to it. Each doctor contributed one-half of the $1,500 paid. Dr. Rowe acted in the utmost good faith in this matter, personally borrowed the amount contributed by him, and the pleading makes no charge of fraud against him. Further, it affirmatively appears that Dr. Rowe, at the time of this settlement, had no knowledge of any fraudulent conduct on part of Dr. McGrath.

Plaintiff's claim is that, until Dr. McGrath's testimony as to the facts and ownership of this land given on August 20, 1926, became a matter of court record, he had, though

suspicious, lacked necessary proof to establish these facts. In this connection the rule in this jurisdiction is that the knowledge of a client's attorney is attributable to and binds the client, where such attorney is acting regularly in good faith in that capacity for his client. *Goergen v. Department of Public Works*, 123 Neb. 648. See, also, *Security Trust Co. v. Tuller*, 243 Mich. 570; *Bates v. A. E. Johnson Co.*, 79 Minn. 354. As already indicated, the verified petition filed in plaintiff's behalf in the district court for Hall county on May 8, 1917, positively stated the facts of this real estate transaction substantially identical with those as testified to at that time by Dr. McGrath. In addition to this, the deposition filed in this cause as early as February 7, 1920, in connection with original documents made a part thereof, not only clearly revealed the fraudulent character of this land transaction, but in connection with surrounding circumstances might be deemed ample evidence to sustain plaintiff's pleading to the extent of establishing a *prima facie* case. In addition to putting the plaintiff on inquiry, obvious sources of additional information were indicated. The rule is that, "Where one is put upon inquiry, he is to be charged with notice of all such facts as he would have learned by reasonable inquiry." *Talich v. Marvel*, 115 Neb. 255 (quoting from *Cooper v. Newman*, 45 N. H. 339).

While it unmistakably appears from the entire record that this real estate transaction of Dr. McGrath was a fraud, and that his acts in connection therewith were fraudulent, yet the fact remains that he made no false statements, claims or representations concerning this land, or the ownership thereof, and committed no fraud in connection with the same, save the fraudulent concealment effected by the transfer of the record title thereof to his wife in 1914. On this state of facts the statute of limitations is tendered as a defense. Our Code provides that civil actions can only be commenced within four years for relief on the ground of fraud, "but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." Comp. St. 1929, sec. 20-207.

Within the intendment of the terms of the statute just quoted the record establishes that the plaintiff in fact discovered this fraud not later than January 29, 1920, that being the day when the deposition was taken of which the letters signed respectively by Dr. McGrath, by the doctor's wife, and by the banker, all relating to the southwest quarter of section 4, township 10 north, range 11, were produced and made a part, which deposition was subsequently filed in the district court for Hall county on February 7, 1920. It necessarily follows that the action is barred. *Hanna v. Bergquist,* 102 Neb. 658; *Wood v. Carpenter,* 101 U. S. 135; *Coad v. Dorsey,* 96 Neb. 612; *Parker v. Kuhn,* 21 Neb. 413.

We have no occasion to examine into the validity of the original settlement or compromise between these parties, or the legal effect of the steps taken. These occurred long after knowledge of the fraudulent transfer involved became imputable to the plaintiff.

"It is obvious that there can be no fraud where the agreement is entered into with knowledge of the facts." 12 C. J. 349. This proceeding to set aside the "satisfaction of judgment" was commenced in the district court for Lancaster county on the 24th day of September, 1928, more than eight years after the cause of action, if it ever existed, accrued. The controlling maxim invoked by this record is: "The laws assist those who are vigilant, not those who sleep over their rights." Broom's Legal Maxims (9th ed.) 570.

It follows that the district court erred in the decree entered in behalf of the plaintiff, in setting aside said satisfaction of judgment dated November 26, 1920, and filed in the district court for Lancaster county in case designated as Docket 53, No. 45, and in reinstating the judgment satisfied thereby. This decree is therefore reversed, with directions to reinstate said satisfaction of judgment, and to set aside the order reinstating said judgment, and to dismiss said proceeding of plaintiff with prejudice to further action.

REVERSED.

GRETA L. SAUM BARTON, APPELLANT, V. HARRY C. BARTON, APPELLEE.*

FILED APRIL 27, 1934. No. 28909.

Divorce: ALIMONY. In awarding alimony in a case where the husband was 52 years of age and the wife 24 years of age, and the marriage lasted but four months, alimony of $300, when the husband has retired from business to live upon his invested capital, is found to be inadequate, and it is fixed at $6,500.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed as modified.*

John A. McKenzie and *O'Sullivan & Southard,* for appellant.

Patrick & Smith, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and MESSMORE, District Judge.

PAINE, J.

Action was brought by a wife to obtain a decree of separate maintenance on the ground of extreme cruelty. Defendant filed a cross-petition, praying for an absolute divorce. After a spirited trial, the plaintiff was granted a divorce. She was allowed $300 alimony, payable at the rate of $50 a month, together with attorney fees in the sum of $700. The trial court dismissed the defendant's cross-petition. The plaintiff appeals from that part of the decree which awards her but $300 permanent alimony.

Plaintiff asked for separate maintenance, with $300 a month for support, and $1,500 attorney fees. Defendant filed a general denial by way of answer to the amended petition, and prayed for an absolute divorce in his cross-petition. The court entered a decree, finding generally that the allegations of plaintiff's amended petition were true, and that the defendant had been guilty of extreme

*Remanded for taxation of costs. See opinion, p. 846, *post.*

cruelty, and granted the plaintiff an absolute decree of divorce, with permanent alimony of $300, payable at the rate of $50 a month for six months from the signing of the decree, the first payment to be due May 12, 1933, and allowed her $700 attorney fees, payable at the rate of $100 a month, and dismissed the cross-petition of the defendant. From the alimony awarded, the plaintiff appealed to this court.

The bill of exceptions filed in this case consists of three thick volumes, embracing the testimony of many witnesses, together with a large number of exhibits, including extensive write-ups and pictures of the parties in Sunday newspapers, checks, letters and photographs.

To give a fair reflection of the evidence in this bitterly contested divorce case it may be better to state first the principal claims of each side separately. The plaintiff testifies, and presents the testimony of friends, to prove about the following state of facts: That she was 24 years of age, and the defendant was 52 years of age, having an only child, a married daughter 26 years of age. The defendant had been successfully engaged in the laundry business in Omaha, and, having retired as a wealthy man, was possessed of a large amount of real and personal property. That she was raised on a farm near Maywood, Nebraska, and at the age of 17 came to Omaha and completed the business course in a business college, including bookkeeping and shorthand, and was thereafter employed by the Standard Oil Company for more than a year, the Manhattan Oil Company for more than a year, the Otis Elevator Company for more than two years, and then by the Westinghouse Electric Company, where she was working at the time she was married. That in September, 1931, she met the defendant at a bridge party at the home of her friends Mr. and Mrs. L. C. Gibson. That the defendant immediately began taking her to dinners and theaters and other entertainments, and after a whirlwind courtship of about four months they were married on February 3, 1932, at Kansas City, instead of

Omaha, at the request of the defendant, the plaintiff being accompanied to Kansas City by her friends, Mr. and Mrs. L. C. Gibson, who returned to Omaha the next day, making the trip at the expense of the defendant. That the plaintiff and defendant then took a very extensive and expensive honeymoon trip, visiting St. Louis for three days, Memphis two days, New Orleans five days, with visits to Biloxi, Pensacola, Jacksonville, St. Augustine, Palm Beach, Miami, Key West, and Havana. Then followed a 13-day ocean trip through the Panama Canal to Los Angeles, where they took an apartment, and defendant purchased an automobile for driving around California. They returned by way of Portland and Seattle, and stopped at North Platte, where the plaintiff's mother and brother came from Maywood to visit them, and reached Omaha May 28, 1932. Upon the return to Omaha they went out to defendant's former home, 3022 Lafayette Avenue, and the Gibsons called upon them the first evening, having missed them at the depot. In the bunch of mail awaiting him at the house was one letter which he handed to Mr. Gibson to read, it being a letter from Attorney McGan on behalf of Thelma Holman, saying that, unless a settlement was made on or before the following Tuesday, suit would be filed against him. At that time Mr. Barton said that the girl was simply trying to blackmail him, and he had prior to that time, during the courtship, stated that this Thelma Holman was an orphan who had worked in his laundry, and whom he had shown many kindnesses, but only in a fatherly way. After the Gibsons had gone, the defendant was worried; said he did not care to live any longer, did not sleep well, and about 6 o'clock the next morning he sat up in bed and confessed to the relations with Thelma Holman, admitting that he had misrepresented his relations to her, and that he had been intimate with her prior to the death of his former wife, which relations had continued for six or seven years; that he had given her about three or four thousand dollars in cash, a fur coat, a diamond ring, and

two automobiles, and had taken her on vacation trips, staying in Minnesota in a cottage for two weeks, and also at Estes Park, Colorado, where they had a cottage and lived together as man and wife. That after breakfast the defendant went to his room and slept a while, and the plaintiff gathered up her things and went to the L. C. Gibson home, and testifies that she was humiliated and shocked to find the kind of a man she had married, and that she stayed at the Gibson home for 5½ weeks, Mr. Barton telephoning to her and calling on her there, and on his first visit to the Gibson home to see her, when he failed to persuade her to come back and live with him, he threatened to go down and see a lawyer and sue her for divorce. On another occasion he wanted to know if she would sign deeds to his real estate before the lawsuit was started by Thelma Holman, so he could transfer all his property out of his name. However, about ten days after the return to Omaha defendant settled the Holman case through her attorney by paying $5,000.

The defendant presents an entirely different state of facts. His brief begins with this paragraph: "In legal terminology, this is a suit for divorce, but in its real purpose it is an action by a designing woman to strip Harry Barton of the little of 'this world's goods' that he has accumulated through years of toil, to which she did not, directly or indirectly, contribute a single cent." Then follows the statement: "Let us examine the record and get the true picture of this woman that counsel attempts to portray before this court as an angelic symbol in human form. Let us unmask this 'babe in the woods,' as counsel term her." The defendant claims that they met in the fall of 1931 at Gibson's; and in December marriage was agreed upon between them, and that he gave her an engagement ring costing $650, because she was not satisfied with one he had selected for less money; that he gave her $405 before their marriage to pay her debts, and made her beneficiary in his life insurance policies to the extent of $6,000; that on the day of the

wedding in Kansas City she wanted photographs taken at $40 a dozen, and became very hostile when the defendant would only purchase some costing $25 a dozen; that she insisted upon attempting to attend a premier showing of a picture in Hollywood when admissions were $5.50 a person, but did not go, as the house had been sold out, and the same show could be seen the next night for 75 cents. That Barton learned in California that he had met with financial reverses in connection with some of his investments, and wanted to return to Omaha immediately, but she objected to any curtailment of the wedding trip, and threatened to go on alone, and the defendant finally completed the trip as originally planned, with the single exception of going from Seattle to Vancouver. That, with the extensive wedding trip over, she seized upon the first pretext to leave him, and never returned, except for money or to loot her husband's apartment in his absence. That Barton made the settlement with Thelma Holman for $5,000 to protect the plaintiff from embarrassment and avoid publicity, in the hope that this settlement would bring about her return, but that the plaintiff gave interviews to the Bee-News and the World-Herald, furnishing pictures to the reporters, and revealing the defendant in the worst possible attitude, simply to satisfy her venomous nature. The defendant secured the evidence of Mr. and Mrs. I. C. Palmer, with whom the plaintiff had roomed a couple of years before her marriage. They testified that she came to their place in the fall of 1929, and had gentlemen callers who would come in automobiles and stop across the street and honk for her, and she would drive away with them. That the only one of these men who ever came into the house was a Mr. Kempfey, in whose store she worked Saturday nights. Mrs. May Palmer testified that she saw a young man making love to plaintiff, and had his arm around her and kissed her near a Christmas tree that they had outside in the yard. That on one occasion plaintiff returned at about 2 o'clock in the morning and went to

the bathroom and used a douche; that Mrs. Palmer followed her in, and said: "You get right out of my home, I won't ask you to get out tonight, but you get out tomorrow." All of these charges were denied by the plaintiff.

In the reply brief, plaintiff attacks the character and reputation of the Palmers, and says plaintiff called G. A. Steele to the stand to rebut the charges made by Palmers that he often honked in his car across the street and waited to take plaintiff out riding. Mr. Steele testified that he was 55 years of age, general manager and vice-president of the Manhattan Oil Company, and had lived in Omaha more than 17 years; that plaintiff had been in his employ for a period of a year and a half. He denied that she had ever been in his Buick coupé, or that he had ever kept company with her in any way, and denied all the statements made by the Palmers in relation to him. He admitted that he might have given the plaintiff a Christmas present of a $2.50 gold piece, as that year he gave such a present to each of the office force. However, there is evidence which shows that plaintiff accepted one or more loans of money from Mr. Steele.

In giving a glance at a few of the high spots from the 1,200 pages of evidence in this bill of exceptions, we have not gone into many unsavory details reflecting upon the standing and character of each of the litigants to this lawsuit, but have only set out small excerpts of the evidence which tended to prove the charges and countercharges made.

It is argued by the defendant that $300 alimony is ample in this case, because she did not assist in earning any of the property.

This court recently said in *Moravec v. Moravec,* 123 Neb. 830, that even where the wife was denied a divorce she could still be allowed alimony at the time her husband procured his divorce. In this case the parties were 55 and 28 years, and each had children by former marriages. In the case of *Mann v. Mann,* 124 Neb. 639, plaintiff had

been required to pay alimony of $80 a month from December 22, 1925, until November 16, 1928, while he was earning $200 a month. These payments were cut to $60 a month when his wages dropped to $135 a month, and later were reduced, and he was finally directed to pay $35 a month for 48 months, a total of $1,680.

Many of the Nebraska cases were reviewed in the opinion in *Swolec v. Swolec,* 122 Neb. 837, showing that payments of alimony had varied from 15 per cent. to 50 per cent. of the husband's property, and it was held that a careful study should be made of the property holdings and earnings of each.

As to the defendant's wealth, there are various estimates of it, from the $25,000 suggested in the argument of his own attorney, to the testimony of plaintiff where she says he told her that in ordinary times he was worth about $250,000, but in times of depreciated stock values he told her that he probably would not be worth over $150,000.

It is insisted by the plaintiff's attorney that this statement of his wealth, made to Miss Saum before marriage, was perhaps quite reliable, for, as she would soon be his wife, there would be no motive to deceive her about his property holdings. When these statements are compared with his testimony at the time of the trial, the plaintiff's counsel insists that defendant's ability to estimate the true value of his property on the witness-stand had become entirely lost, due to the exigencies of the occasion.

Much is made of the fact that the four months' honeymoon cost $2,000, in round figures, but defendant had often told his wife, both before and after marriage, that he enjoyed an income of $500 a month from his investments, so this wedding trip, which was not solely for the pleasure of the plaintiff, as defendant's counsel indicates, but which the defendant also enjoyed, at least for the first three months, until he heard his business needed him in Omaha, did not make any inroads on his principal. The defendant's holdings seemed very difficult to arrive at, and his

testimony, viewed in a fair way, and putting it mildly, offered little helpful assistance in finding what his property consisted of, or what its actual value might be at the time of the trial.

Among the defendant's holdings is a fine, improved farm, of 147 acres, in Thurston county, Nebraska, located right on the edge of Pender. The farm is level and nice land, and was assessed the year before the trial for $14,115, and in some years had rented for cash rent of $1,000. Defendant testified under oath that this farm was not worth anything at all. Doubtless a very conservative estimate of the value of this farm would be $15,000.

Without considering for any purpose the fact that plaintiff testifies that defendant told her he usually kept $5,000 in a safety box, and had a checking account, which ran at one time around $1,800, and had a good automobile, and a fine diamond ring, and considerable personal property, in the furnishings of his home and elsewhere, it may disclose the wide gulf between the value of several items of his property as set out in the evidence, or as argued by the attorneys for the respective litigants, to list some of the items of defendant's property, with the values assigned by each side:

Description of property	Plaintiff	Defendant
The Pender farm, 147 acres	$15,000	$4,900
Home at 3022 Lafayette Avenue, Omaha	4,000	2,000
½ interest in house, 3018 Lafayette Avenue	3,000	750
House at 2141 Newport Avenue	2,750	2,000
Two-story brick building, northwest corner 16th and Clark, assessed at $6,600	5,000	?
Carmen Distributing Co., mortgage	6,500	?
Meisner College, first mortgage	2,700	?
Sioux City Laundry, mortgage	6,000	?
Wright residence, first mortgage	2,675	?

Emerson Laundry, second mortgage	4,000	no value
Deer Park Blvd. property, second mortgage	1,400	worthless
Indiana Limestone	5,000	valueless
Lincoln county drainage bonds	2,000	valueless
Mortgage Bank of Chile	2,000	160
Argentine bonds	3,000	1,200
Cacuca Valley bonds	2,000	150
German Central Agricultural Bank	1,000	400
Medina Temple bonds, Chicago	2,500	valueless
Low-Barcade-Hall bonds, Minneapolis	2,000	valueless
10 shares, Union Stock Yards	1,000	700
25 shares, Moody Investment Service	2,500	worthless
50 shares, American Colortype	5,000	100
50 shares, Standard Oil, Nebraska	5,000	700
25 shares, Southern California Edison	2,500	350
35 shares, Fairmont Creamery Co.	3,500	2,200
13 shares, Insuranceshares of Delaware	1,300	20
Abe Lincoln Copper Co.	1,250	worthless
16 shares, Thompson-Belden Co.	?	?
Totals,	$94,575	$15,630

The true value doubtless lies somewhere between these estimates, and the average of the two estimates would be about $55,000. If defendant had died while on the wedding trip, the plaintiff would have been entitled, as a second wife, to one-quarter of this property, or $13,750.

With this brief statement of the property holdings, we will now consider the law applicable thereto. The defendant calls our attention to several cases which were not discussed in the case of *Swolec v. Swolec, supra.* In *Zimmerman v. Zimmerman,* 59 Neb. 80, the referee recommended alimony of $3,000, the property being all accumulated by the husband prior to their marriage, and this court reduced the alimony to $2,500. In *Isaacs v. Isaacs,* 71 Neb. 537, the wife left the same year they

were married, and refused to return to her husband, although he offered to do anything that was within his power to make a home for her. The court held that he was not required to dispose of his farm in Wayne county, Nebraska, and move to Ohio because she preferred to live there, and that her refusal to live with him constituted desertion. The court held that, where a wife, absolutely without cause, refuses to live with her husband, and has not helped to accumulate any of his estate, and he obtains a divorce on the ground of desertion, she is not entitled to alimony.

In *Price v. Price*, 75 Neb. 552, a widower with children married a widow with children, and relatives interfered to make conditions intolerable for the wife, and she took her children and moved to a home that she owned in Grand Island, where she put her children in school, and the defendant frequently came and stayed with her temporarily. She always agreed to come back and live with him if he would provide a proper home. The defendant was earning $50 a month, and was the owner of personal property of the value of $500, and the court directed that he pay his wife $100 a year for her support and maintenance until he provided a suitable and proper home in which she could live with him.

In *Brewer v. Brewer*, 79 Neb. 726, a 22-year-old boy secretly conveyed his property to his mother just before marrying a 19-year-old girl, and the mother arbitrarily assumed the management of the home. The young wife refused to stay under such tutelage, and this court held that she was entitled to separate support and maintenance under those conditions.

The nearest case in point cited by defendant's counsel from Nebraska is *McKee v. McKee*, 2 Neb. (Unof.) 322, in which Commissioner Pound reviewed six Nebraska cases relating to the amount of alimony allowable, and held that the court should consider the financial standing of the parties, the duration of their marriage, the value of the husband's estate, and the source from which it

came, and how far, if at all, the wife had contributed thereto. The plaintiff in the case was the defendant's second wife, and was in robust health, had supported herself before her marriage, and was able to support herself after her divorce. She brought little, if anything, in the way of property, and the district court granted her a divorce on the ground of extreme cruelty, with alimony of $1,500, and $150 attorney's fees. The principal item owned by the defendant was a farm of 120 acres, the average estimates of value being about $35 an acre, making it worth $4,200, and he owed $1,000, leaving a net value of the husband's holdings of $3,200. Commissioner Pound says: "Taking the whole testimony together, however, remembering that she has received all the household goods that she cared to take, we are constrained to think that the award of $1,500 alimony, coupled with $150 for attorney's fees is too much;" and cut the award to $1,000, which, including the household goods she had received, gave her approximately one-third of his property.

In the case at bar, criticism is made that the plaintiff is a "gold digger," and was simply marrying an old man for his money, but the evidence clearly convinces us that the aggressive courtship put on by the defendant indicates that he was fully as anxious as she was to consummate the marriage. The trial court, in finding that she was entitled to a divorce, must have considered that defendant's deceit in concealing his former relations with Thelma Holman entirely justified the plaintiff in leaving him, and plaintiff decided, as was her right, that she did not desire to forgive this wrong and go back to him. We can find no precedent in this state, under the evidence in the case at bar, for cutting plaintiff off with alimony of but $300 and attorney's fees of $700, after deciding she was legally entitled to a divorce. Prior to their marriage he made her a beneficiary under life insurance policies to the amount of $6,000. He very promptly settled the Holman threat of suit for $5,000 cash. In case

of his death while on the wedding trip, plaintiff would, under the law, have received one-quarter of his estate, no antenuptial agreement being mentioned, together with the life insurance he had transferred to her.

Considering all of the evidence, including his courtship and their legal marriage, together with the charges and countercharges on each side, we decide that alimony in the sum of $6,500 is amply justified in this case. The attorneys for plaintiff have already received very liberal allowances in the way of temporary and permanent attorneys' fees, but an allowance of an additional $500 is made for services in this court. As thus modified, the decree is affirmed.

AFFIRMED AS MODIFIED.

The following opinion *in re* costs was filed April 27, 1934. *Cause remanded for taxation of costs.*

1. Courts: COURT REPORTER: FEES. The fees allowed a court reporter under sections 27-337 and 27-339, Comp. St. 1929, and objections thereto, discussed, and it is *held* that no fee in addition to the 15 cents per hundred words can be allowed.
2. ———: ———: BILL OF EXCEPTIONS. The official court reporter is not required to report arguments pro and con upon motions made to perfect the pleadings before the trial begins, and such arguments are no part of the bill of exceptions.
3. ———: ———: ———. The official court reporter is not required to report arguments upon the objections to introduction of evidence, and such arguments are not a proper part of the bill of exceptions.

PAINE, J.

In this case, we are brought face to face with sharp and insistent objections to the charges made by the court reporter for the bill of exceptions.

On June 23, 1933, John A. McKenzie, one of the attorneys for the plaintiff, filed an affidavit in the supreme court, asking that the defendant be required to pay to the clerk of the district court the approximate cost of

bill of exceptions, $550; of transcript, $10; appeal bond, $10; filing fee in the supreme court, $20; approximate cost of printing briefs, $50; being a total of $640, in order that the plaintiff might appeal her cause to the supreme court.

On June 26, 1933, William R. Patrick, attorney for the defendant, filed his affidavit in this court in opposition thereto, especially attacking the cost of the bill of exceptions, estimated at $550, and "says that William F. Milotz, the official court reporter in said trial in the district court, persisted in taking down in shorthand all of the argument presented by counsel pro and con upon motions or objections in relation to the reception and introduction of evidence."

In the brief of defendant, paragraph VII is entitled, "Inflation of the Record and Reporter's Fees," and reads as follows:

"This court by order required defendant to pay for the bill of exceptions—'at legal rate.' The inclusion of a large amount of extraneous matter therein, with a demand for compensation greatly exceeding the statutory fees, raises the issue as to what may be included in the record, and collected for. The reporter first demanded $490, but subsequently conceded that the record does not exceed 251,976 words, but arbitrarily added $61.15 for 'indexing and numbering.' * * * Defendant paid $377.96 under protest and upon stipulation that further payment or refund, as case may be, will be made in accordance with this court's determination. * * * No direction or request for recording additional matter was made, but the reporter wilfully persisted in recording argument of counsel, extended remarks of court, and other irrelevant and improper matter, for which he seeks to mulct defendant.

"Preceding the taking of testimony a motion, previously filed, to strike a large portion of plaintiff's amended petition was argued and disposed of, and the argument thereon, and the discussion of the court sustaining said motion fills the first forty pages of the record."

In response to these charges, William F. Milotz, the official court reporter, has filed a printed brief in this court in his own behalf. In this brief he first sets out section 27-337, Comp. St. 1929, which provides as follows: "Duties of Reporter. The said reporter shall attend all terms of the district court held within and for the district for which he is appointed, and shall make a stenographic report of all oral proceedings had in such court, including the testimony of witnesses with the questions to them, verbatim, and any further proceedings or matter when directed by the presiding judge so to do, or requested by either party to said proceeding, and when requested at the beginning or during the progress of the trial by any party to the proceedings all comments and statements made by the judge in the presence of the jury shall in all cases be taken down and recorded by said reporter; but the parties may, with the consent of the judge, waive the recording by such reporter of any part of the proceedings herein required to be taken; this shall not include arguments to the jury. And whenever, during the progress of the cause, any question arises as to the admissibility or rejection of evidence or any other matter causing an argument to the court, such argument shall not be recorded by the reporter, but he shall briefly note the objection made and the ruling of the court thereon, and any exceptions taken by either party to such ruling."

This section of our statute has not been amended in many years, and there has rarely arisen any dispute over these provisions. We admit the language could be clarified, for it says he shall make a stenographic report of *all* oral proceedings, and then proceeds to say that, after taking the testimony of witnesses verbatim, and all the comments of the judge in the presence of the jury, he need not take other proceedings unless directed by the presiding judge or requested by the parties. It specifically says that arguments on the admission or rejection of evidence *shall not* be recorded.

The first 40 pages of this bill of exceptions is a ver-

batim record of objections to the pleadings, with copious citations therefrom. No witness was upon the stand, and this 40 pages consists simply of efforts of counsel to amend pleadings, the argument pro and con, and the running observations and remarks and rulings of the court. The first paragraph reads as follows: "Mr. Patrick: If the court please, there is a motion that I think should be presented this morning before we proceed further. For the convenience of your honor I will let you have our copy which I have marked up somewhat. The motion is to strike from the plaintiff's amended petition the following portions thereof which appear to be irrelevant, redundant and immaterial matter."

We have been unable to find any law requiring the reporter to take in shorthand such informal discussions of the pleadings which occur in advance of the trial. We therefore come to the conclusion that if the reporter voluntarily takes them they cannot be written up as part of the bill of exceptions for which an unwilling litigant can be compelled to pay under our statute.

Again, defendant's counsel, in support of his charge that the court reporter is forbidden to report the arguments arising upon objections made in the taking of the testimony, cites us to *Clough v. State,* 7 Neb. 320, where Judge Lake, when considering objections to an 1,100-page bill of exceptions, which he said was double the quantity actually necessary or proper, made use of the following language:

"For instance, there is page on page taken up with the arguments of the respective counsel on the numerous questions constantly raised during the trial as to the admissibility of testimony, and also with the remarks of the court in assigning reasons for the rulings thereon, all of which serve no useful purpose, but tend materially to encumber and obscure the record, and to increase the expenses of a trial far beyond what is legitimate. * * *

"It not unfrequently happens that quite lengthy arguments are made by counsel on questions thus raised, and

in deciding them the judge may see fit to give elaborate reasons for his decisions, but neither of these has any business whatever in the record, nor should the stenographer be permitted to encumber his report with them, when it can only result in augmenting his compensation, with nothing valuable given in return."

It appears clear that a reporter should not take down, and, certainly, if taken down, should not expect pay for transcribing, the entire arguments upon the objections to the introduction of evidence.

Now, in regard to the amount to be charged for the proceedings which are authorized to be taken, we have section 27-339, Comp. St. 1929, which reads, in part, as follows: "It shall be the duty of such reporter to furnish on the application of the county attorney, or any party to a suit in which a stenographic report of the proceedings has been made, a longhand copy of the proceedings so recorded, or any part thereof, for which he shall be entitled to receive in addition to his salary, a fee of fifteen cents per hundred words, to be paid by the party requesting the same; except, where such copy is required by the county attorney, his fee therefor shall be paid by the county in the same manner as other claims are paid."

In considering that portion of the charges of the court reporter, $61.15, for indexing and numbering 1,223 pages, being five cents a page, we find no statute allowing this charge. In the supreme court rules, section 9a covers the preparation of the transcript by the clerk of the district court, and, inadvertently, a portion of a sentence is inserted there reading, "and the questions in the bill of exceptions to be numbered." This should, of course, be in paragraph 9b, covering the bill of exceptions. Doubtless no attorney would object to the reporter numbering the interrogatories in the bill of exceptions and charging for each blow of a numbering machine as one word, but in examining this bill of exceptions many a page has only one question, and rarely any page more than ten such

numbers. The index required by the rules of this court could, of course, be counted and charged for as allowed by statute. These three volumes are "bound" by placing a piece of Manila paper on each side and running three extra long brass staples through the top. It is the simplest and most convenient way in which the reporter can arrange the sheets for delivery. Some reporters are requested by attorneys to have the bill of exceptions bound in cloth or boards in a permanent manner which reflects credit upon both parties, and the actual cost of such binding would willingly be paid by the counsel ordering the same, but cannot be collected under the law from a litigant unwilling to pay for the same. I find that Justice Sedgwick had a similar matter before him in the case of *Pettis v. Green River Asphalt Co.*, 71 Neb. 513, 519, and determined that the necessary expense of settling a bill of exceptions upon the determination of a cause in the district court is taxable as costs incurred in that court, to be adjudged against the unsuccessful party in the final determination of the litigation, and, therefore, following this precedent, this court can determine whether the statute has been followed in the amounts charged, but the costs of settling the bill of exceptions must be taxed in the district court. If any extra compensation, in addition to that allowed to him by the statutes herein cited, is thought desirable by the official reporter, in addition to his salary of $2,750 a year (Comp. St. 1929, sec. 27-336) such relief should be secured through the legislature, and not through the courts.

We have gone through the 1,223 pages of the bill of exceptions in this case twice, page by page, and find that many pages consist of arguments upon amending the pleadings and arguments upon the objection to the introduction of evidence, including cross-table discussion between counsel, and that such record is not a proper or necessary part of a bill of exceptions which a litigant can be compelled to pay for over his objection, and that there are 12,000 words of such record, after allowing

credit for the index pages, which had not been counted, and deducting this amount from the total number of words by actual count, stipulated in the bill of exceptions to be 251,976, leaves 239,976 words which, at 15 cents a hundred, amounts to $359.96, which should be taxed in the district court as the cost of the bill of exceptions.

REMANDED FOR TAXATION OF COSTS.

SCOTTSBLUFF NATIONAL BANK, APPELLANT, V. JOHN H. PFEIFER, APPELLEE.

FILED APRIL 27, 1934. No. 28757.

1. **Exemptions.** "Whether property in the hands of a garnishee is exempt or not is to be determined as of the date of the service of the garnishee summons." *Wilcox & Co. v. Deines*, 119 Neb. 692.
2. ———. Where a garnishee summons was served June 7, 1929, and claim for exemption was filed May 5, 1932, claiming $500 of fund garnisheed exempt in lieu of homestead, but the application did not state that debtor had no lands, town lots nor houses subject to exemption as a homestead on the date the garnishee summons was served, *held*, application failed to state facts sufficient to constitute valid claim for exemption.
3. ———. A garnishment is a proceeding *in rem*, and where a final judgment has been entered against defendant and garnishee in such a proceeding which adjudicated the rights of the parties to the money in controversy and directed the payment of a stated amount thereof to the creditor, the defendant being before the court and making no claim that any part of the property was exempt, *held*, that, by failing to make any claim for exemption before such judgment, defendant lost his right to make such claim, the question being *res judicata*.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Reversed.*

Mothersead & York, for appellant.

J. L. Grimm, contra.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

ELDRED, District Judge.

June 6, 1929, an order of attachment and garnishment was issued in this case, return of which was made June 7, 1929, showing service on Platte Valley State Bank as garnishee. The garnishee disclosed a deposit of $1,965 in the name of Anna M. Pfeifer.

May 4, 1932 (the case in the meantime having been to supreme court, 120 Neb. 445) hearing was had on separate motions of John H. Pfeifer and Anna M. Pfeifer for discharge of attachment and garnishment and the answer (termed affidavit of interpleader) of the garnishee showing it had in its possession $1,965, which was deposited in the name of Anna M. Pfeifer. The motions to discharge attachment and garnishment were overruled. The case proceeded to trial on the same day on the issues joined between the plaintiff and the defendants. There was a finding and judgment for plaintiff against John H. Pfeifer for $2,169.58, and costs, and in favor of the defendant Anna M. Pfeifer; and $500 of the money in the possession of the garnishee was adjudged the property of Anna M. Pfeifer, the balance, amounting to $1,465, adjudged to be the property of John H. Pfeifer. Garnishee was ordered to pay said sum into court, and from said sum clerk ordered to pay, first, unpaid costs, and the amount remaining to be paid to the plaintiff, Scottsbluff National Bank, to be credited upon its judgment against John H. Pfeifer. No appeal was taken from that judgment, and it appears in full force and unmodified.

May 5, 1932, John H. Pfeifer filed an affidavit for exemptions, claiming that he was the head of a family; that he has no lands, town lots or houses subject to exemption as a homestead; and that the $1,465 found by the court to be his property constitutes his entire personal property, and claims $500 of said sum exempt in lieu of homestead. December 1, 1932, on trial of claim for exemptions, the

claim for exemptions was sustained by the court, and the clerk ordered to pay $500 of the funds paid to him by the garnishee in said cause to John H. Pfeifer, as exempt, from which order the plaintiff has appealed.

The claim for exemptions of appellee, John H. Pfeifer, was made and filed on May 5, 1932, stating that he "has" no lands, etc., subject to exemption, and that he "has" no personal property other than the $1,465. The affidavit does not state nor disclose that the appellee did not, at the time the garnishment summons was served, have property exempt as a homestead.

It is urged by appellant that its right under the garnishment proceedings became fixed and established on the date of service of the notice on the garnishee, and whether the property in the hands of the garnishee is exempt must be determined as of that time, and not at the date when the application for exemptions was filed, which in this case appears to have been nearly three years later. This contention seems well taken.

"Whether property in the hands of a garnishee is exempt or not is to be determined as of the date of the service of the garnishee summons." *Wilcox & Co. v. Deines*, 119 Neb. 692; *Van Kirk v. Beckley*, 123 Neb. 148. See *Kilpatrick-Koch Dry Goods Co. v. Callender*, 34 Neb. 727. The application, failing to state that debtor had no lands, town lots nor houses subject to exemption as a homestead on the date the garnishee summons was served, did not state facts sufficient to constitute a valid claim for exemptions.

It is further contended by appellant that the judgment entered by the trial court on May 4, 1932, was a final adjudication of the rights of the parties to the fund involved in this suit; that is, the sum of $1,465, which the court ordered paid to the appellant, Scottsbluff National Bank, after the payment of costs.

This action, so far as garnishment proceedings are concerned, is a proceeding *in rem*. From the date of the service of the garnishee summons the fund involved in

the proceedings was placed in *custodia legis*. While the property stood in that condition a judgment was rendered adjudicating the ownership of the property and the disposition to be made of it. The appellee was a party to the record. The claim made for exemptions after entry of that judgment might have been made before the judgment was rendered. After the judgment *in rem* against him, it is too late for a party to the record to assert a claim for exemptions which might have been made on the trial and determined by the judgment.

While we have a statutory provision (Comp. St. 1929, sec. 20-1554) providing that claim for exemptions may be made at any time before sale, that section can have no application in a garnishment proceeding where there is no sale of the property involved. It would seem that the rule in such case is that claim for exemption should be made within a reasonable time. The effect of the judgment entered was to put the parties in the same position they would have been had the sheriff made a sale of the attached property, paid the proceeds to the clerk of court, and the court had ordered them paid to the creditor. Where the defendant has notice, as he had in this case, he should avail himself of the privilege of setting up every claim or demand he has to the property, to the end that the court may not enter an improvident judgment. *United States Fidelity & Guaranty Co. v. Hollenshead*, 51 Wash. 326.

Final judgment *in rem* having been entered against the defendant, he being before the court and failing to assert a claim for exemptions before judgment disposing of the fund garnisheed, he is barred from making such claim afterwards; the question being *res judicata*. *Rector v. Rotton*, 3 Neb. 171; *New Mexico Nat. Bank v. Brooks*, 9 N. M. 113.

After the brief of appellant was filed in this case, a copy of some proceedings in the United States district court, In the Matter of John H. Pfeifer, Bankrupt, was filed in this court, certified by the clerk of the district

court for Scotts Bluff county as having been filed in that court on December 23, 1932, from which it appears that the referee in bankruptcy, under date of December 19, 1932, ordered the funds involved in this action set aside to the bankrupt as exempt.

This court has not been favored with any brief by the appellee in this proceeding. On oral argument it was urged that these bankruptcy proceedings disposed of the matter in controversy. But, as previously stated, the judgment of the district court, under date of May 4, 1932, remained in full force and unmodified, and was a final adjudication of the ownership of the property; the rights of the appellant thereto were not affected by the subsequent proceeding in bankruptcy.

For the reasons stated herein, the judgment of the district court is reversed and the cause remanded.

REVERSED.

FIRST TRUST COMPANY OF LINCOLN, TRUSTEE, APPELLANT, V. EXCHANGE BANK ET AL., APPELLEES.

FILED APRIL 27, 1934. No. 28777.

1. **Trusts.** As a general rule, the measure of care and diligence required of a trustee is such as would be pursued by a man of ordinary skill and prudence in the management of his own affairs, when making an investment in which the primary object was the preservation of the fund, and the secondary one that of obtaining an income therefrom. He must act honestly and faithfully in what he believes to be the best interests of the *cestui que trust*. And where by the terms of the trust he is given discretion in the execution thereof, the discretion exercised must be a reasonable and not an arbitrary one, and not an investment in property, the value of which is contingent upon remote eventualities.
2. **Banks and Banking: INSOLVENCY: TRUST FUNDS.** Where a trustee deposited funds of a trust estate in a bank of which he was president and active managing officer, and as such trustee purchased of said bank, through himself as its presi-

dent and active managing officer, certain valueless notes, trust funds being withdrawn from the trust account in the bank and paid to the bank therefor, knowledge of such president and active managing officer, acting for the bank in the transaction, as to the trust character of said funds, will be imputed to the bank. In such case the trust fund being traced into the bank, where it was mingled with and augmented its general mass of assets, the bank is chargeable as a constructive trustee with the duty of accounting to the trust estate for the funds so wrongfully converted, and a trust will be impressed upon all the assets of said bank for the amount found due, superior to claims and liens of depositors and creditors.

3. ———: ———: REORGANIZATION: TRUST FUNDS. In the reorganization and reopening of an insolvent bank, pursuant to statute, the change in stockholders, officers and management, the bank continuing to operate under the same articles of incorporation, does not create a new nor dissolve the old corporation; nor does such change of stockholders and reorganization estop the trustee of a trust fund, received by the bank prior to its reorganization, from recovering the same from the bank as reorganized.

4. ———: ———: TRUST FUNDS: CONVERSION: REMEDIES. Where funds wrongfully converted are traced into a bank where they are mingled with the general mass of bank assets, which are enhanced thereby, the succeeding trustee has an election of remedies,—an action at law for conversion, or a suit in equity for the recovery of the fund, and to impress a trust on the general mass of bank assets superior to claims and liens of depositors and creditors.

5. **Pleading.** When sufficiency of petition is first raised after issues of fact joined, by objection to the introduction of evidence or demurrer *ore tenus*, it will be liberally construed, and, if possible, sustained.

6. **Limitation of Actions.** The transaction involved was had in the year 1923, between K., as trustee of a certain trust fund, with himself, as president and active managing officer of Exchange Bank. The trustee concealed such transaction by failing to truly state the disposition of said trust fund in annual reports made by him to the county court in the trust estate until the year 1930, and by failing to advise the *cestui que trust* of the investment in question. *Held*, to toll running of statute of limitations.

7. **Equity:** LACHES. Doctrine of laches has no application where

parties, upon whom rests the duty of prosecuting an action for the recovery of trust funds, were the wrong-doers.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed, with directions.*

Woods, Woods & Aitken and *Nye & Nye*, for appellant.

Miller & Blackledge and *N. P. McDonald, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

ELDRED, District Judge.

Frank A. Hershey died leaving a will which was admitted to probate; and on June 14, 1918, Ira A. Kirk was appointed trustee of certain assets of said estate, accepted such trust, and acted as such trustee from the date of his appointment to May 3, 1930, on which date he was removed from such position, and the plaintiff (appellant), First Trust Company of Lincoln, Nebraska, was appointed trustee by the district court for Buffalo county.

On and prior to the date of his appointment as such trustee, and continuously thereafter, up to December 29, 1929, Ira A. Kirk was president, a principal stockholder, and active managing officer of the appellee Exchange Bank, Gibbon, Nebraska. December 29, 1929, said bank was closed by the department of trade and commerce, after which time Kirk was no longer connected with the management thereof. Appellee S. L. Leas is trustee and has in his possession or control assets of the Exchange Bank, which he holds in trust for the benefit of depositors and creditors.

This suit was instituted by the First Trust Company of Lincoln, trustee of the Hershey trust estate, as an action in equity, against the Exchange Bank, Gibbon, Nebraska, Ira A. Kirk, and S. L. Leas, trustee, for an accounting and the recovery of the sum of $2,900, with interest from October 18, 1923, claimed to have been wrongfully invested in the notes of Clarence K. Geyer. Plaintiff fur-

ther prays that the assets of said bank be impressed with a trust for the amount found due; and that recovery be adjudged a lien against the assets of said Exchange Bank in its possession and in the possession of S. L. Leas, trustee, superior to the claims of the depositors and creditors.

Among the assets delivered to the plaintiff, as the new trustee of the Frank A. Hershey trust estate, were four promissory notes signed by one Clarence K. Geyer, all dated July 11, 1923, two notes being for $500 each, due one year after date, and one for $1,000 due nine months after date. These three notes were payable to the Exchange Bank, Gibbon, Nebraska. The fourth note has no payee nor date of maturity designated. All four notes were indorsed, "Exchange Bank, without recourse, I. A. Kirk, Pt."

The plaintiff contends: (a) That the Geyer notes were worthless, and known by Kirk to be worthless at the time they were sold to the trust estate; that the investment was an improper one, made without approval by any constituted authority, and was a breach of trust imposing an obligation on Ira A. Kirk, the trustee making such investment, to restore the funds thus wrongfully diverted; (b) that the Exchange Bank, through its president and active managing officer, had knowledge that the funds of the trust estate were being wrongfully diverted, knowingly participated in such wrongful diversion and profited thereby; and the assets of the bank being augmented by the breach of trust, it is chargeable as a constructive trustee with the duty of accounting to such trust estate therefor; (c) that, since the trust fund has been traced into the bank and its assets augmented thereby, the plaintiff is entitled to have the assets of the bank, in its direct control, and also the assets of the bank deposited with S. L. Leas, trustee, impressed with the trust for the amount wrongfully diverted, with interest, prior and superior to any claim or lien of depositors and creditors in the bank.

The defendants, answering, admit certain formal allega-

tions of the petition; deny other allegations; plead the statute of limitations and laches, reorganization of the bank and estoppel; and that Kirk, with the permission of the county judge of Buffalo county, executed to such judge a real estate mortgage to secure said notes, which security defendants contend should be first exhausted. On trial in the district court there was a finding and decree in favor of all defendants and against plaintiff. Plaintiff appeals, and the case is here for trial *de novo*.

During the time of the transactions involved herein, Ira A. Kirk, as trustee of the trust estate of Frank A. Hershey, kept funds of said trust on deposit in the Exchange Bank. At the same time he was president, a principal stockholder and active managing officer of said bank. On the 18th day of October, 1923, said bank was the owner and holder of the notes of Clarence K. Geyer, previously described, and also one other note for $900, the same being a part of the assets of the bank. On said date the appellee Kirk, as trustee of the Frank A. Hershey estate, purchased of the appellee Exchange Bank, through himself as its president and active managing officer, four notes totaling $2,900, the purchase price of $2,900 being paid out of the cash of the trust estate on deposit in the Exchange Bank, and said money was paid to the bank and mingled with its general mass of assets.

The briefs of appellees are devoted almost entirely to the discussion of the contention that the amended petition of appellant does not state facts sufficient to constitute a cause of action. No demurrer was filed to the amended petition. The sufficiency of the amended petition was first raised after issues of fact were joined, by demurrer *ore tenus;* that is, by objection to the introduction of evidence. "The rule is that, after issues are joined, the pleadings will be liberally construed. But when a pleading is tested by demurrer, before issue joined, it is construed most strongly against the pleader." *Frye v. Omaha & C. B. Street R. Co.*, 106 Neb. 333. See *Johnston v. Spencer*, 51 Neb. 198.

It is urged that it appears from the face of the petition that the cause of action is barred by the statute of limitations and laches, and that fraud is not sufficiently pleaded. As to the wrongful or fraudulent acts which are the basis of this action, the petition alleges the relationship of Kirk to the Exchange Bank, and his position as trustee of the Hershey trust estate; that the bank was the owner of the Geyer notes described on October 18, 1923; that both the bank and Kirk had full knowledge that said notes were worthless and uncollectible; that the notes were fraudulently sold and transferred by the bank through Ira A. Kirk, its president and active managing officer, to Ira A. Kirk, trustee of the Frank A. Hershey trust, for a consideration of $2,900; that sum was delivered by Kirk from the assets of the trust estate to the Exchange Bank; that Ira A. Kirk, as president of the bank, indorsed said notes "without recourse" on the Exchange Bank; and that the assets of said bank through such acts were augmented and enhanced to the extent of $2,900 at the expense of said trust estate, which transaction is alleged to have been a breach of trust and a wrongful and fraudulent act. The wrongful and fraudulent acts complained of consisted in the breach of the trust by the trustee, alleged to have been participated in by the Exchange Bank. The amended petition sets forth, in a general way, the ultimate facts as to the claimed wrongful and fraudulent acts relied upon. The facts are not as fully detailed as they might properly have been; but, giving this amended petition the liberal construction to which it is entitled, it not having been attacked by demurrer, we hold the allegation as to the wrongful and fraudulent acts sufficient at this time.

The amended petition alleges that neither the plaintiff nor the beneficiaries of said trust had any knowledge of said wrongful and fraudulent acts until the appointment of plaintiff as trustee of said trust estate about the 3d day of May, 1930. The want of knowledge of the alleged wrongful and fraudulent acts is set out as specifically, if not more so, than it was in the petition in the case of *Abbott*

v. Wagner, 108 Neb. 359, an action for relief on the ground of fraud, in which on page 381 of the opinion it is stated: "We do not think that there is any merit in the contention that it appears from the face of the petition that the statute of limitations has run against the plaintiffs' cause of action. One of the allegations of the petition is: 'That the plaintiffs did not discover the fraud attempted by the defendants (named) as above set out, until within two years prior to the filing of this petition.' "

As to the evidence bearing upon the statute of limitations and laches: The transaction involved was solely between Ira A. Kirk, as president and active managing officer of the Exchange Bank, and the same Ira A. Kirk, as trustee of the Hershey trust estate. After the date of that transaction, October 18, 1923, and prior to the 5th day of February, 1930, Kirk filed reports as trustee for each year with the county judge. The reports for 1926 and 1927 did not attempt to itemize investments; but for the other years, beginning with 1923, investments were itemized. In none of the reports was any mention made of having any Geyer notes; but Kirk states, in his testimony on the trial, that he included the amount invested in the Geyer notes with the amount charged against himself personally; and it was not until the report was filed for the year 1929, under date of February 5, 1930, that investment in the Geyer notes was disclosed. Until that time Ira A. Kirk appears to have been the only person who was possessed of any knowledge of the transaction. When effort was made to ascertain from Kirk, while a witness, why he listed the Geyer notes as "I. A. Kirk" on his report for 1923, he stated, "maybe looked better;" and when pressed further as to that and other reports, his replies were evasive and unsatisfactory. By his acts Kirk concealed the investment in the Geyer notes from the county court and all others who might have examined the records. He testified that he never advised the beneficiaries, either by correspondence or orally, of the investment. The facts disclosed by the

record were sufficient to toll the running of the statute of limitations. *Lewis v. Welch,* 47 Minn. 193.

Prior to the 3d day of May, 1930, Ira A. Kirk was the trustee of the Hershey trust estate, by whom an action for the recovery of the trust fund should have been instituted. He was himself one of the alleged wrong-doers whose acts constituted the basis of this action. The Exchange Bank, through the acts of said Kirk, its president and active managing officer, participated in and its funds were augmented by the wrongful acts of said Kirk, as its president and active managing officer, at the expense of said trust; hence, said bank was a joint wrong-doer. Under such circumstances the doctrine of laches has no application. 21 C. J. 238; *Williard v. Campbell Oil Co.,* 77 Mont. 30.

Prior to the fall of 1917, Clarence K. Geyer had been employed as a farm hand; he was then about 28 years of age and unmarried. That fall he borrowed of Roscoe Lunger, an officer of the Commercial Bank, Gibbon, Nebraska, $70 to buy a cow; Geyer then had no money to put into the deal; the returns on the sale of the cow came back to the bank, and the profits were divided. He had a series of transactions of a similar nature covering a period of some two months, during which time he made a profit of about $2,400. He wanted to enlist in the war and went back to Pennsylvania for that purpose. Before leaving he bought about $400 worth of clothes, took $1,000 with him, and left $1,000 in the bank about two months, when it was drawn out. The witness Lunger considered Geyer of exceptional ability as a buyer of cattle; very good in the handling of stock; square in his deals, and never heard his honesty questioned.

W. F. Graham: First saw Geyer in 1917, herding sheep for Marshall Ross; after he left the employment of Ross, he was buying stock; the first time he left he went to the army; the last time he said he was going to western Pennsylvania; reputation for honesty and integrity good;

was sober, of good moral character, and skilful in the live stock business.

The foregoing shows the activities, history and personal standing of Geyer before he entered the army prior to his transactions with the appellee Exchange Bank, which began several years later.

Roscoe Lunger: Fully two years after the war before Geyer came back; said he wanted to make arrangements to buy stock again; that Marshall Ross had agreed to loan him or give him $500 if he would do business with the Exchange Bank. He wanted to start buying on a more extensive scale; wanted to go to Denver and furnish cattle for feeders around there, "and I told him that would take too much money and I told him I couldn't see my way clear to do it; I didn't have the money."

Ira A. Kirk, appellee: Did not know Geyer in 1918; but he was there, I guess. He was there before the war, as I remember it. Didn't know him then. Knew what he was doing. Commenced doing business with him about June, 1922. He might have deposited a little money to start an account and then let it run as an overdraft. Believe the amount he started the account with was $500. If I loaned it I had some one sign the note with him; kind of remember that Ross signed the first note. Do not believe he had any property or real estate then; might have had some horses. Would ship stock and the money would come back to the bank from the commission firms; he had an account, and if there was an overdraft, would let it stand until he got remittance, then would credit his account. Quit doing business with him about July, 1923. His business had run behind; could not pay all losses suffered; took notes to protect bank for overdrafts; had no security and no collateral; notes taken July 11, 1923, do not know why not put on discount register until August 6, 1923, nor how bank ceased doing business with Geyer. He went away from there; suppose that was the end of our business, probably; do not know when he left. "Q. Mr. Geyer's business transactions had been unsuccessful, is

that correct, during the period that the bank— A. Well, they were, yes, through that period. Q. During that period? A. That is mostly; yes. He made money, plenty of it, but he lost it all in probably a few shipments, the way I remember it." Well, we thought we had advanced enough. When Geyer ceased doing business with the bank, the obligations of Geyer to the bank were $2,900; it might have been $3,900. Thought Geyer was of good ability and good reputation. About 33 years of age when we began doing business with him. Knew he was honest and had made money and supposed he would do it again. Disposition to pay debts was all right. Would pay them when he could. "Q. You stated that your business with Geyer was conducted in a profitable way. Just when did he conduct any business with you in a profitable way? A. It is hard to tell that, but he made money on a good deal of the shipments, but he lost more. Q. He lost more than he made? A. He lost on other shipments; yes. He was a real good money-maker on the most of it. Q. At the end of the time that you dealt with him it wasn't a profit, was it? He lost money? A. Well, of course he owed us some when he quit. * * * He didn't have the money, of course. * * * Q. And what stopped him doing business was the fact that the bank shut off his credit and wouldn't let him draw on it any longer, isn't that a fact? A. Yes; I think that is so. We thought he owed us enough. Q. You thought it wasn't any use going any further? A. I suppose that was it. Q. Now, you say Geyer had a disposition to pay his debts. As a matter of fact, you lost all track of where he was, didn't you? A. Yes. Well, he got out of the notion of paying them when he got away, but I believe he would pay them out if he could make enough money. He was honest, a good fellow." The $900 note was indorsed the same as the others, but was paid later out of the profits of the bank.

S. L. Leas, trustee, appellee: President of appellee Exchange Bank, Gibbon, since its reorganization. Did not know of Geyer owning any property when he left.

W. F. Graham: I would not know the date when he (Geyer) left; no, sir. It was after he had a lot of bad luck buying cattle in Denver. He bought three big loads of cattle in Denver; heavy stuff, and the market broke, and he held them a while, and the market kept going and going. That was Geyer's first big downfall. That was the last of his buying here. He was around quite a while before he left; maybe a month. He kept getting worse and worse. He did not have a sale before he left. He did not have anything. He cleaned up all of his stuff.

The foregoing gives a history of the business activities and financial experiences of Geyer, as well as his standing and reputation, from the time he commenced doing business with the Exchange Bank, appellee, until the notes involved herein were sold by the Exchange Bank through Ira A. Kirk, its president and managing officer, to Ira A. Kirk, trustee for the Hershey trust estate.

It is apparent that the Geyer notes purchased by Kirk, trustee, from the Exchange Bank for the Hershey trust estate were of no value at the time they were purchased. Subsequent facts make certain what was quite apparent at that time. The question is: Was the investment by the appellee Kirk, as trustee of the Hershey trust estate, in the notes in question, an improper one, and such a breach of trust as to impose an obligation on the trustee making such investment to restore the trust funds diverted thereby? In determining that question the situation must be viewed as it should have appeared to a trustee of ordinary vigilance and diligence, in the position of the appellee Kirk, and knowing what he knew of the personal standing of Geyer, his business and financial activities and ability at the time, and the conditions under which the indebtedness evidenced by the notes were created. On the one side we have the fact that about the year 1917, before Geyer went into the army, during a brief experience of about two months, he was successful in business and made substantial profits. Further, that his character and reputation for honesty, integrity and fair

dealing were good at all times, and he was considered a good buyer and skilful in the handling of cattle. Although appellee Kirk, while stating that Geyer was honest and had a disposition to pay his debts, also stated he got out of the notion of paying them when he got away, but still expressed the view that when he took the notes he believed they would be paid. On the other side we have the fact that, at the time Geyer started doing business with the Exchange Bank, the profits he accumulated when he was in business some years before were evidently exhausted. He borrowed money to start a bank account, his business was not successful, and, in the short time he was doing business, a period probably not much over a year, he created the overdraft for which the notes were given. The bank had shut off his credit; believed he owed it enough; that he had nothing to pay the overdraft with; no property nor collateral. In extenuation of his act of taking the notes from Geyer without security, appellee Kirk testified: "Of course, you know they loaned money those days on character and worth in place of security. Sometimes they were lots better than some security we had." But the notes involved were not acquired in the ordinary or normal course of banking business as an evidence of a loan, but were acquired in settlement of an overdraft occasioned by losses incurred through unprofitable business transactions with which the managing officer of the Exchange Bank was familiar. Geyer was at that time an unmarried man, about 33 years of age, having no property interests there, and had left the community. The bank later, though not obligated on the $900 note, being indorsed "without recourse," paid that note out of the profits of the bank.

A trustee is not an insurer and is not absolutely bound for the results of his acts. As a general rule, the measure of care and diligence required of a trustee is such as would be pursued by a man of ordinary prudence and skill in the management of his own estate. 26 R. C. L. 1280, sec. 130. He must act honestly and faithfully, in

what he believes to be the best interests of the *cestui que trust.* He must exercise sound discretion. He is bound to proceed with diligence in investigating the nature of the proposed investment, and to use such care in deciding as, in general, prudent men of intelligence and integrity in such matters would employ in their own affairs when making a permanent investment in which the primary object is the preservation of the fund, and the secondary one that of obtaining an income therefrom. *In re Buhl's Estate,* 211 Mich. 124, 12 A. L. R. 569. If he invests in property, it ought to be property which yields an actual income, and which has a valuation in the general sense of the community, founded on that income, and not on remote eventualities and a succession of contingencies. 26 R. C. L. 1307, sec. 161.

Appellee Kirk directs attention to the provisions of the Hershey will, which provides: "It being my intention that the said trustee, in the management of the said trust estate and in its investment and reinvestment shall have as complete power to select investments as I would or might have had if I had remained living. * * * And said trustee shall not be personally liable with respect to any matter or thing done under any of the provisions of this will unless it (he) shall be guilty of negligence in the premises." And in the brief it is urged: "All that the trustee is required to do under this will is to act honestly and with ordinary discretion." But the discretion to be exercised under such circumstances in the execution of the trust must be a reasonable and not an arbitrary discretion. *In re Allis' Estate,* 191 Wis. 23; *Pabst v. Goodrich,* 133 Wis. 43. If any discretion was exercised in the purchase of the notes in question, it was, under the facts in this case, an arbitrary one. It seems clear that the notes involved in this case, at the time they were purchased for the estate, had no value according to the usual and ordinary tests; apparently the maker had no further credit there; he had no property; he had left that community and was reported to have gone to an-

other state. Kirk had knowledge of this situation. The purchase of the notes was a mere adventure, the value of which was contingent upon being able to locate the maker, the possibility of his having accumulated property out of which the indebtedness could be made, and his willingness or ability to pay. The conclusion is that the appellee Kirk, as trustee for the Hershey trust estate, in the purchase of said notes and the payment therefor out of the funds of the trust estate, did not exercise such diligence in the care and management of said trust estate as a man of prudence and discretion in such matters would ordinarily employ in his own affairs, and that his failure so to do was negligence, and such a breach of trust as to impose an obligation upon him to restore to the trust estate the funds diverted thereby.

At the time appellee Exchange Bank sold to Kirk, as trustee of the Hershey trust estate, the notes involved herein, and received in payment funds belonging to said trust estate, Ira A. Kirk was the president, a principal stockholder, and the active managing officer of said bank, and acted for the bank in that transaction. Knowledge of such president and active managing officer as to the trust character of such funds was therefore imputed to the bank. *State v. Citizens Bank,* 125 Neb. 882; *State v. Bank of Otoe,* 125 Neb. 414.

The bank, through its president and active managing officer, having participated in the wrongful conversion of the trust fund, and said trust fund being traced into the bank, where it was mingled with and augmented and enhanced its general mass of assets, it is chargeable as a constructive trustee with the duty of accounting to the trust estate for the funds so wrongfully converted, and a trust should be impressed upon all of the assets of said bank; that is, the assets under the direct control of the bank and also those in the control of the appellee S. L. Leas, trustee, to the extent of the balance not heretofore paid nor refunded to said trust, and interest, superior to any claim or lien of depositors and creditors. *State v. Bank*

of Otoe, 125 Neb. 414; *State v. Farmers State Bank*, 121 Neb. 532; *State v. Dwight State Bank, ante*, p. 388.

The reorganization of the Exchange Bank after the date of the transactions involved herein did not affect the rights and liabilities of the parties. While new stockholders were secured and new officers were in charge, the bank was operating under the same charter and articles of incorporation, and under the same name. Further, such change of stockholders and reorganization does not estop the trustee of a trust fund, received by the bank prior to its reorganization, from recovering the same from the bank as reorganized.

The assets in the possession or control of S. L. Leas, as trustee of certain depositors, are still the assets of the bank, though held by him as trustee for the depositors' committee for a specific purpose. However, the contract offered in evidence, under which S. L. Leas is holding the assets, makes provision for just such a contingency as here exists. Leas also testified to that effect. The claims of the depositors and creditors are inferior to the claim of the plaintiff for the trust funds of the Hershey estate. The trust funds never became the property of the bank, and are not assets to which the depositors and creditors would be entitled. *State v. State Bank of Touhy*, 122 Neb. 582.

The appellees contend that appellant should have brought an action at law and not in equity, and that they were entitled to a jury trial. Under the facts involved in this case the appellant, as the succeeding trustee of said trust fund, had an election of remedies. *Robinson v. Tower*, 95 Neb. 198. It is apparent that an action at law would not have been as effective as an action in equity. The trust fund having been mingled with the general mass of bank assets which were thus augmented and enhanced, resort may be had in equity to impress thereon a preferred claim payable from such general mass of bank assets. *State v. Farmers State Bank*, 121 Neb. 532.

Appellees further contend that appellant should be re-

quired to look first for the satisfaction of its claim to a mortgage given by Ira A. Kirk before proceeding with this action. On February 5, 1930, on order of the county court, made on the application of Ira A. Kirk, the said Kirk executed to the "county judge of Buffalo county, Nebraska, and to his successors in office, and to Ira A. Kirk as trustee in trust under the will of Frank Hershey, deceased, and to his successors in trust" a certain real estate mortgage, to secure said trust against any losses on account of the trust funds aggregating $79,604.32; $15,660.65 thereof being due from Kirk personally. It is stipulated that no notice was given to any one other than Ira A. Kirk of the hearing on the petition for the execution of said mortgage. There is some contention as to the value of the real estate covered by the mortgage; but we do not consider that material in this case. The provisions of the mortgage are not in the usual or ordinary form, but are complicated and involved. Regardless of the value of property, it is quite apparent, under the conditions of the mortgage, that the time when it might be enforced, if at all, would be problematical. While not expressing an opinion as to the validity of that mortgage, we conclude that its acceptance by the county judge is no bar to the pursuing of the remedy adopted by the appellant in this case.

The investment was made by Kirk in the Geyer notes aggregating $2,900. Plaintiff in its petition pleads that a note of Geyer for $1,000, in which no payee was designated, was through inadvertence delivered in lieu of a $900 note. The $900 note was not produced at the trial. The amount of the consideration paid for the notes, $2,900, is not controverted. There is no satisfactory explanation as to how the $1,000 note, which is without a payee, got into the possession of the plaintiff, though it is indorsed the same as the others. But the inability to produce the $900 note is accounted for by the evidence of Ira A. Kirk, who testified that several years later, about 1928, after he began to think the note was probably not good,

he took from the profits of the bank the amount of this $900 note and credited it to the Hershey trust fund, and that the $900 note was taken up by the Exchange Bank (not by Geyer) at the time. There is no evidence to contradict this testimony, except that Kirk in his report, exhibit No. 21, dated February 5, 1930, lists the Geyer notes as $3,000. This may be accounted for by the party making up the report for Kirk, finding the $1,000, no payee note, with the other notes produced on the trial. We conclude that the estate was refunded or paid by the Exchange Bank the amount invested in the $900 note. The finding of this court is that the appellant, First Trust Company, of Lincoln, Nebraska, recover from the appellees, Ira A. Kirk, Exchange Bank, Gibbon, Nebraska, and S. L. Leas, trustee, the sum of $2,000, with interest at the rate of 7 per cent. per annum from the 18th day of October, 1923, and that the amount so found due be impressed as a trust and lien upon all the assets of said bank in the possession and control of said bank, and S. L. Leas, trustee. Judgment and decree of the trial court reversed, and judgment and decree will be entered in this court on the foregoing finding, and for costs, and the cause is remanded to the district court, with directions to carry into effect the judgment and decree of the supreme court.

REVERSED.

GREELEY COUNTY, APPELLEE, V. FIRST NATIONAL BANK OF COZAD, APPELLEE: PAUL NELSON ET AL., APPELLANTS.

FILED APRIL 27, 1934. No. 28877.

1. **Counties.** *Held*, under the circumstances in this case that, as between two successive assignees of the same claim against the county, the second assignee is entitled to the amount due.
2. **Estoppel.** Where a principal has entrusted an agent with apparent ownership of a claim for collection and the agent sells the claim to a *bona fide* purchaser for value, the latter will be protected.

3. ———. Where one of two innocent persons must suffer by reason of the wrongful act of a third person, the one who made it possible for the third person to commit the act should bear the loss.

APPEAL from the district court for Greeley county: RALPH R. HORTH, JUDGE. *Affirmed.*

Morsman & Maxwell and *Lanigan & Lanigan*, for appellants.

Cook & Cook and *T. J. Howard, contra.*

Heard before ROSE and PAINE, JJ., and LIGHTNER, REDICK and THOMSEN, District Judges.

LIGHTNER, District Judge.

Interpleader under section 20-325, Comp. St. 1929, to determine the ownership of a fund. The contest is between two successive assignees of a claim against Greeley county, namely, the First National Bank of Cozad and Paul and Mary J. Nelson. The district court found in favor of the bank and Nelsons are appealing. It will be more convenient in this opinion to refer to the parties as the bank and the Nelsons. The county of Greeley is the plaintiff and nominally an appellee, but has no interest in the outcome.

The Nelsons claim the fund on the ground that they through their agent, Solomon, received the first assignment of it, and the bank claims the fund because it gave the first notice to the debtor, Greeley county, and for other reasons which will be referred to later.

Stating the facts, which are not in serious dispute, more fully, it appears that in July, 1931, Standard Bridge Company of Omaha, Nebraska, sold to Greeley county, a car-load of lumber for $1,620 f. o. b. point of delivery. The lumber was delivered in July, 1931, and the freight in the sum of $628.75 was paid by Greeley county, leaving a balance due the Standard Bridge Company of $991.25.

One E. G. Solomon of Omaha, Nebraska, was the investment agent of the Nelsons. On August 3, 1931,

Standard Bridge Company sold and assigned the account against Greeley county to said E. G. Solomon, the assignment being in the following words:

"Omaha, Neb. August 3, 1931.

"For value received, I hereby sell, assign, transfer and set over to E. G. Solomon all my right, title and interest in and to any and all moneys arising or coming to me from the county of Greeley Neb. by reason of a certain claim No.———— against the said county for bridge material amounting to one thousand six hundred twenty and no/100 dollars, which said claim was filed with the county clerk on the 1st day of August, 1931. At its own expense the Standard Bridge Company may collect the above sum and upon such collection hold the same for the assignee hereunder and for the use of such money from this date until such assignee is fully repaid the Standard Bridge Company shall pay such assignee interest at the rate of 7 per cent. per annum from Aug. 3, 1931, until paid in cash or registered warrants.

"And I hereby authorize, empower, direct and instruct the county clerk of said county to assign and deliver all warrants therefor to E. G. Solomon.

"Standard Bridge Company, Assignor,
"By J. H. Vastine, Auditor."

With this assignment the Standard Bridge Company delivered to Solomon a copy of the lumber bill against Greeley county. When he purchased the account, Solomon paid for it with money of the Nelsons in his possession, and notified them of the purchase, but kept the copy of the lumber bill and the assignment in his own possession. It does not appear that Standard Bridge Company had any knowledge of the Nelsons' connection with the matter.

At the time of the assignment of the account to Solomon, the account had not been filed as a claim in the county clerk's office of Greeley county. Solomon did not file the account and assignment, or either of them, with the clerk of Greeley county, but on August 11, 1931,

Standard Bridge Company in its own name filed the account with the county clerk of Greeley county, as a claim due to Standard Bridge Company.

On said 11th day of August, 1931, an agent of Standard Bridge Company procured from the county clerk of Greeley county a certified copy of the claim so filed, such certified copy being as follows:

"Greeley, Nebr. Aug. 11, 1931.

"Standard Bridge Co.
"Omaha, Nebr.

"In Account with Greeley County
Contract #329/31 L. O. 9749—Car—S. P. 66888
Cold seasoned Fir Lumber Standard Sawn

50 3x12 24'— 3600' @ $37.50 per M	$ 135.00
100 3x12 20'— 6000' @ $37.50 per M	225.00
700 3x12 16'—33600' @ $37.50 per M	1,260.00
	$1,620.00

"I hereby certify that this is an exact copy of a claim on file in this office for payment.

"D. W. Healey, County Clerk.

"I, E. J. Cejda, being duly sworn, do depose and say the above account is just and correct; that the same is due as herein charged, and that the amount claimed, after allowing all just credits, is wholly unpaid.

"E. J. Cejda.

"Subscribed and sworn to before me this 11th day of Aug. A. D. 1931.

"(Seal County Clerk) D. W. Healey, County Clerk."

Thereafter, and on August 25, 1931, an agent of Standard Bridge Company, with the said certified copy of the claim in his possession, called at the First National Bank in Cozad, and sold and assigned the account and claim to the bank for the sum of $1,620, the bank paying the Standard Bridge Company $1,400 and crediting it $220 on an account owing by the company to the bank growing out of another transaction. At said time the Standard Bridge Company, by its agent, delivered to the bank the

said certified copy of the claim, and also executed and delivered to the bank an assignment, in duplicate, in the following words:

"Omaha, Neb. August 25, 1931.

"For value received, I hereby sell, assign, transfer and set over to First National Bank, Cozad, Nebr. all my right, title and interest in and to any and all moneys arising or coming to me from the county of Greeley by reason of a certain claim No. ———— against the said county for car fir lumber amounting to sixteen hundred twenty and no/100 ($1,620) dollars, which said claim was filed with the county clerk on the 11th day of August, 1931.

"Standard Bridge Co. hereby guarantees the payment of the above principal, together with interest at the rate of ten (10) per cent. per annum from August 25, 1931, until paid in cash or county warrant.

"And I hereby authorize, empower, direct and instruct the county clerk of said county to assign and deliver all warrants therefor to First National Bank, Cozad, Nebr.

"Standard Bridge Company, Assignor,
"By W. L. Reynolds, Agent."

"In the presence of W. T. Thompson."

On August 26, 1931, the bank wrote the county clerk of Greeley county that it had purchased the claim from Standard Bridge Company, and inclosed with the letter the above assignment. This letter was sent by registered mail and received by the county clerk of Greeley county on August 28, 1931. The assignment was filed and retained by the county clerk, and the letter returned to the bank with a notation thereon by the county clerk that the claim was now $991.25, as freight in the amount of $628.75 had been deducted.

E. G. Solomon died in November, 1931, and the copy of the account and assignment thereof were found in his effects, and in December, 1931, the administrator of his estate delivered to the Nelsons an assignment of the account. On or about December 24, 1931, the Nelsons

mailed to the county clerk of Greeley county a notice of a claim to the account. This was the first notice ever given to the county that either Solomon or the Nelsons had any interest therein. The assignment from Standard Bridge Company to Solomon and the assignment from Solomon's administrator to the Nelsons were not filed with the county clerk of Greeley county until in January, 1932.

The bank purchased the claim in August, 1931, for value, with no notice of any right or claim of Solomon or of the Nelsons therein, and no knowledge of any such right or claim until December or January following.

Petition for adjudication of bankruptcy of Robert Z. Drake, doing business as Standard Bridge Company, was filed January 21, 1932, and adjudication of bankruptcy was on March 10, 1932.

The question litigated was as to the respective rights of the bank and the Nelsons to the moneys due on the claim. The trial court found generally for the bank and against the Nelsons, and ordered the moneys due on the claim, in the sum of $991.25, paid to the bank.

"The authorities are in direct conflict on the question whether, as between successive assignees, assignments of choses in action take precedence according to their date or only from the time of notice to the debtor." 5 C. J. 953. In *Ottumwa Boiler Works v. O'Meara & Son,* 206 Ia. 577, it is said: "The numerical weight of the authorities favors the rule that the assignee first giving notice of his claim to the debtor is preferred to the assignee who is prior in time, but who has not given such notice. This rule is recognized by the English courts, and seems to be the rule in California, New Jersey, Ohio, Missouri, Mississippi, Virginia, Tennessee, Vermont, Maine, Pennsylvania, Maryland, and Oklahoma. It is held, as between assignees of a common fund, that the one prior in point of time has priority, although he has given no notice of his assignment to either a subsequent assignee or the debtor, by the supreme court of the United States, and

by the courts of New York, West Virginia, Minnesota, Massachusetts, Oregon, Texas, and Kentucky." There is a note in 31 A. L. R. 876, on the subject. The reasons given to sustain the majority view are that it is the duty of the first assignee to do all in his power to take possession, that failing to give notice to the debtor is equivalent to leaving personal property in the seller's possession after he has sold it. That it puts the seller in position to commit a fraud on a third person. The reasons for the rule are given in the case of *Dearle v. Hall* (1823) 3 Russ. 1, 10 Eng. Rul. Cas. 478, wherein it was said: "In *Ryall v. Rowles* (1749) 1 Ves. Sen. 348, the judges held that, in the case of a chose in action, you must do everything towards having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person, who has an equitable or legal interest in the matter, under an obligation to treat it as your property. For this purpose, you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession, and under the absolute control, of another person."

The reasons for the rule are again stated in the case of *Murdoch & Dickson v. Finney,* 21 Mo. 138, as follows: "If, after a chose in action is transferred by its owner, it is assigned a second time, and the last assignee first give notice to the debtor of his right, his equity will be superior to that of the first assignee who has neglected to give notice; for, by such failure, the first assignee has enabled the owner of the chose in action to commit a fraud by making another sale. The second purchaser, by inquiring of the debtor, might have learned whether the debt had been transferred, or if notice of the transfer had been given to the debtor, he, after such notice, would pay the debt to another at his peril. The precaution of

making inquiry is always taken by a diligent purchaser, and if it is not taken, there is neglect, and no relief is extended to him who has been guilty of it."

In *Jenkinson v. New York Finance Co.*, 79 N. J. Eq. 247, it is said: "The equitable ground upon which the rule rests is the one adopted finally and after much discussion, viz., that the failure of the prior assignee to give notice is a negligence which leaves the assignor in a position where by his apparent ownership he is able to deal with the property in a manner to defraud or injure any subsequent purchaser notwithstanding all due inquiry made."

The reasons generally given for the minority rule are that the assignor, having made one assignment of the debt or fund, has nothing more to assign, and that the second assignee therefore takes nothing. The rule of *caveat emptor* applies. In the Texas case of *Hess & Skinner Engineering Co. v. Turney*, 110 Tex. 148, reasons for the rule are stated as follows: "In our opinion the rule is sound, which gives priority in rank to equitable assignments in the order of their dates, without regard to notice to the debtor. * * * The debtor is fully protected because he is not affected by the assignment until notified, and the subsequent assignee, in dealing with a chose in action, is chargeable with knowledge that he can get no better right than that of his assignor. It increases uncertainty in the law's administration to substitute the date of notice to the debtor as the test of priority for the date of assignment; and we can see how grave harm would follow for us to now depart from our thoroughly established simple test of priority in right from priority in time of the assignment." In *Columbia Finance & Trust Co. v. First Nat. Bank*, 116 Ky. 364, it is said: "The rule of *caveat emptor* applies to sales of choses in action as in other sales of personal property, and, if the seller has sold the thing to one person, and therefore has no title to pass to a second, the latter takes nothing by his purchase." It would be futile to attempt to quote from

the numerous authorities which support each of the divergent views. The authorities are collected in the note in 31 A. L. R. 876, above referred to, and in the recent case of *Salem Trust Co. v. Manufacturers Finance Co.*, 264 U. S. 182, 31 A. L. R. 867, wherein the supreme court of the United States aligns itself with the minority. Other late cases holding with the minority are *Ottumwa Boiler Works v. O'Meara & Son*, 206 Ia. 577; *Coon River Cooperative Sand Ass'n v. McDougall Construction Co.*, 215 Ia. 861; *Wilson v. Duncan*, 61 Fed. (2d) 515; *Moorestown Trust Co. v. Buzby*, 109 N. J. Eq. 409; *American Employers Ins. Co. v. Roddy*, 51 S. W. (2d) (Tex. Civ. App.) 280.

It is not necessary to decide which of the conflicting rules should be adopted in Nebraska, because under the circumstances of this case the second assignee is, in our judgment, entitled to the amount due by the application of well-established equitable principles. It does not appear that the agent who made the assignment to the bank knew of the first assignment to the Nelsons. No intentional fraud is shown and if Solomon, who was acting for the Nelsons at that time, had notified the county of the assignment it is not probable that an effort would have been made to sell the same claim to the bank because the agent at least of the assignor would have known of the Nelson assignment and it is not likely that he would have asked the county clerk to certify to the claim without showing the assignment, nor likely that the county clerk would have certified to the claim and given a copy to the agent without making it appear somewhere, either on the face of the claim or in his certificate, that the claim had already been assigned. These considerations answer the argument of the Nelsons that the bank was not injured by the failure of Solomon to give notice because the bank had not inquired before it purchased the claim. The evidence as a whole indicates that if the prior assignee had given notice the bank would have been advised through the county clerk or the claim would not have been a second time offered for sale.

Even in the states where the minority rule prevails it seems to us that the bank in this case would have to prevail. At the time of the assignment to the Nelsons the claim had not been filed against the county. Solomon authorized his assignor to collect the amount due from the county and thereby made the Standard Bridge Company his agent to file and collect the claim after it had been assigned to him. In giving this authority to his agent, Solomon put it in its power to commit the very act which it did commit in this case. Where one of two innocent persons must suffer by reason of the wrongful act of a third person, the one who made it possible for the third person to commit the act should bear the loss. The mere fact that the Nelsons had made their assignor, the Standard Bridge Company, its agent to "collect the above sum and upon such collection hold the same for the assignee" would not authorize its agent to sell and assign the claim. 2 C. J. 635, 653. But the rule is otherwise where the principal clothes the agent with apparent ownership and thus puts it in his power to defraud third persons. "Where the principal has fraudulently or negligently entrusted property to an agent with all the indicia of authority or ownership, a third person purchasing from such agent for a valuable consideration and in entire good faith will be protected from any claims of the principal, although the agent may have been given possession of the property for a special purpose and without authority to dispose of the same." 2 C. J. 882. It is quite apparent from the record, which shows a long course of dealings between them wherein claims after assignment were filed or collected by the bridge company in its own name, that Solomon, the agent of the Nelsons, intended the Standard Bridge Company to file the claim in its own name and collect the amount. He thus clothed the Standard Bridge Company with indicia of ownership, apparent authority to sell and assign, gave no notice whatever of his or their ownership of the claim, and thereby enabled the bridge

company to sell to the bank, which is an innocent purchaser for value.

In the note above referred to in 31 A. L. R. 876, it is said on page 881 that, "even in a jurisdiction where the minority view prevails, it has been held that a second assignee, who first gives notice to the obligor, is preferred to a first assignee who is negligent not only in failing to give notice to the obligor, but also in failing to take possession of the written evidence of the obligation," which in the case referred to was an insurance policy. See *Herman v. Connecticut Mutual Life Ins. Co.*, 218 Mass. 181, Ann. Cas. 1916A, 822.

In *Salem Trust Co. v. Manufacturers Finance Co.*, 264 U. S. 182, it is said:

"Facts and circumstances may create an equitable estoppel against the first assignee. *Herman v. Connecticut Mutual Life Ins. Co.*, 218 Mass. 181; *Rabinowitz v. People's Nat. Bank*, 235 Mass. 102. It would be unconscionable to permit him to prevail over a later assignee whom he had misled or deceived in respect of the assignor's title at the time of purchase by the latter. * * *

"The result will be the same if it be assumed that each *bona fide* purchaser takes merely an equity in the chose in action assigned. If equities are equal, the first in time is best in right. Otherwise the stronger equity will prevail."

Here the equities are in favor of the bank, which not only gave the prior notice, both because the Nelsons not only failed to give notice, but made their assignor their agent to collect in its name the indebtedness, thus clothing it with the indicia of ownership.

In *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 71 Am. St. Rep. 26, 44 L. R. A. 632, it was held that a subsequent assignee of book accounts and bills receivable, who notifies the debtor of such assignment, has a superior title to that of a prior assignee thereof, who has failed to give such notice, especially where the accounts and bills were left with the assignor for collection, and the

second assignee took possession thereof without notice of the prior assignment. In *Coffman v. Liggett's Adm'r*, 107 Va. 418, it was held that a later assignee of a chose in action, who first gave notice to the obligor of an assignment, is preferred to a prior assignee who failed to take possession of the evidence of indebtedness, and thereby contributed to the fraud by the assignor.

Another consideration in this case that supports the judgment of the district court is that the bank had funds of the assignor in its possession after this money was paid out and might have protected itself against loss if the first assignor had given notice within a reasonable time.

Appellant further contends that the assignment to the bank is only "the right, title and interest" the bridge company had on the date of the assignment, August 25, 1931, that it amounts merely to a quitclaim deed, and that inasmuch as the bridge company had nothing at that time to transfer the bank took nothing. The rights of the parties cannot be measured by the mere form of the instrument, but by the intention of the parties at the time. This part of the assignment is in the same form as that to the Nelsons. There are cases where a quitclaim deed is simply for the purpose of releasing some possible interest and there are other cases where the intention is to transfer the entire property. The facts and circumstances surrounding this transaction show that the intention was to transfer the entire claim to the bank. It is different from a quitclaim deed, inasmuch as it contains a guaranty of payment by the assignor and a direction to the county clerk "to assign and deliver all warrants therefor to First National Bank, Cozad, Nebr." The assignment as a whole is both a representation and a warranty that the amount mentioned was then due from the county to the Standard Bridge Company, and the bank paid the full face of the claim.

The judgment of the district court is right and is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. DWIGHT STATE BANK, E. H. LUIKART, RECEIVER, APPELLANT: PLUM CREEK TOWNSHIP, INTERVENER, APPELLEE.*

FILED MAY 25, 1934. 28674.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and CHASE and ELDRED, District Judges.

Per Curiam.

On motion for modification of opinion, paragraphs 1 and 2 of the syllabus are withdrawn and the following paragraph substituted:

"Public moneys left with a bank by a township treasurer, without said bank having been designated by the governing body of the township as a depository, and where such moneys are mingled with the general assets of the bank, such assets will be impressed with a trust to the extent of any balance in favor of the township as against the receiver of the bank."

This is done for the sole reason that the matters determined therein are unnecessary for a decision of the case.

*See former opinion, *ante*, p. 388.

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12. Publishing companies whose papers were transported by truck operated by truck owner *held* independent contractors who were not liable for truck driver's negligence. *Zajic v. Johnson* 191
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14. Statute prohibiting parking of vehicle on main-traveled portion of highway *held* not applicable to disabled vehicles. *LaFleur v. Poesch* 263
15. Acceptance, required by proprietor of contractor's work, to relieve contractor of liability for injuries to third persons after acceptance is a practical acceptance after completion of work; formal acceptance not being required. *Haynes v. Norfolk Bridge & Construction Co.* 281
16. Gross negligence of motorist, sued by guest for personal injuries, must be determined from the circumstances of each case. *Sheehy v. Abboud* 554
Belik v. Warsocki 560
17. Gross negligence within motorists' guest law means negligence in a very high degree, but does not necessarily extend to wanton or wilful or intentional disregard of guest's safety. *Sheehy v. Abboud* 554

Belik v. Warsocki 560
18. To recover under the motorists' guest law, plaintiff must allege and prove that defendant was guilty of gross negligence. *Belik v. Warsocki* 560
19. A motorist suddenly confronted by an emergency is not necessarily guilty of negligence if he pursue a course which mature reflection might prove to be wrong. *Belik v. Warsocki* 560
20. A motorist has a right to assume that the driver of an approaching car will not violate the law in passing. *Belik v. Warsocki* 560
21. Question of admissibility of evidence of speed of automobile prior to time of accident rests within the discretion of the trial court. *Showers v. Jones Co.* 604

Bail.

1. Recognizance to perfect appeal by defendant convicted of misdemeanor in county court, not conditioned that defendant appear before district court forthwith and from day to day thereafter, confers no jurisdiction on district court. *Larson v. State* 374
2. Recognizance on appeal to district court *held* fatally defective. *Larson v. State* 374

Bankruptcy.

1. An insolvent manufacturing corporation which has sold its plant for the purpose of liquidating is not a "going concern," and a deposit of proceeds of the sale is not a deposit "in the ordinary course of business," as regards bank's right of set-off. *Wilson v. Nebraska State Bank* 168
2. To entitle a bank to set off a bankrupt debtor's deposit against the debtor's note to the bank, the deposit must have been made in the ordinary course of business. *Wilson v. Nebraska State Bank* 168
3. Application of deposit of bankrupt to note due bank within four months of filing petition in bankruptcy *held* an unlawful preference. *Wilson v. Nebraska State Bank* 168

Banks and Banking.

1. The double liability of bank stockholders cannot be enforced until ascertainment of amount due and exhaustion of assets. *Parker v. Luehrmann* 1
2. The constitutional liability of bank stockholders is enforceable under the rule that equity has jurisdiction of a receiver's action against all stockholders jointly to enforce their contractual or statutory liability. *Parker v. Luehrmann* 1

3. The appointment of a receiver for a bank and judicial determination of deficiency of assets by the receivership court does not vest such court with exclusive jurisdiction of a suit to determine liability of stockholders. *Parker v. Luehrmann* 1
4. Suit to enforce liability of bank stockholders may be brought in any county where service of summons can be had. *Parker v. Luehrmann* 1
5. Constitutional amendment authorizing receiver of bank to enforce stockholders' double liability before exhausting bank's assets *held* not applicable to stock purchased prior to adoption of amendment. *Luikart v. Paine* 251
6. Bank stockholders' constitutional double liability prior to amendment of 1930 *held* a secondary liability, enforceable only after assets had been exhausted. *Luikart v. Paine* 251
7. Bank stockholders' double liability is a contractual obligation, the nature and extent of which are determinable from constitutional provisions in effect at time of purchase of stock; such provisions being material parts of the contract. *Luikart v. Paine* 251
8. A deposit to be held intact and returned in specie is a special deposit. *State, ex rel. Sorensen, v. American State Bank* 34
9. A deposit to be held and used for a special purpose is a specific deposit. *State, ex rel. Sorensen, v. American State Bank* 34
10. Where a court appointed a trustee over a fund to be paid in instalments to a minor and directed the fund to be deposited in a bank, of which the trustee was cashier, until further order, the fund became a specific deposit entitling the owner to preference on bank's insolvency. *State, ex rel. Sorensen, v. American State Bank* 34
11. Purchaser of cashier's check, bank draft, or certified check generally becomes a creditor of the bank and the holder of exchange, and not the beneficiary of a trust. *State, ex rel. Sorensen, v. South Omaha State Bank* 46
12. The burden of proving that money in a bank is a trust fund rests on the person asserting it. *State, ex rel. Sorensen, v. South Omaha State Bank* 46
13. Deposit of school district funds in a duly designated depositary, in absence of special agreement to the contrary, constitutes a general deposit. *State, ex rel. Sorensen, v. Farmers & Merchants Bank* 245

14. Fraud in procuring a guaranty and pledge of collateral is ground for cancelation, and on cancelation collateral may be restored to pledgor after insolvency of pledgee bank as trust property in hands of receiver of pledgee. *State, ex rel. Sorensen, v. State Bank of Omaha* 343
15. Where a bank receives moneys unlawfully and mingles them with its general assets, equity will impress the bank's assets with a trust in favor of the owner of such moneys. *State, ex rel. Sorensen, v. Dwight State Bank* 388
16. A claim against an insolvent bank adjudicated to be a trust fund bears 7 per cent. interest. *State, ex rel. Sorensen, v. Plateau State Bank*..... 407
17. A bank, not designated a depositary, holds deposit of village funds as trustee. *State, ex rel. Sorensen, v. Plateau State Bank*..... 407
18. Bank receivers and trial courts must attempt to secure highest possible price for assets of insolvent bank. *State, ex rel. Sorensen, v. Denton State Bank*..... 486
19. Substantially increased offer to receiver for assets of insolvent bank before confirmation of judicial sale justifies court's action in denying confirmation. *State, ex rel. Sorensen, v. Denton State Bank*..... 486
20. Issuance of certificate of deposit for money deposited created relationship of debtor and creditor, which was not changed to that of trustee and *cestui que trust* because the depositor's administrator did not know of deposit until informed thereof by receiver of bank, though bank with knowledge of depositor's death did not disclose existence of the certificate. *State, ex rel. Sorensen, v. Commercial State Bank*..... 490
21. In a prosecution for falsifying bank reports, a deposit *held* completed when a depositor tendered in bank to an officer a deposit slip which was accepted by the officer and a duplicate deposit slip issued therefor. *Foreman v. State*..... 619
22. Moneys paid to bank for purpose of paying mortgage and completing sale of land *held* a trust fund payable, on bank's insolvency, in preference to claims of general creditors. *Davis v. Polak*..... 640
23. Trust fund *held* to be a preferred claim on the general assets of an insolvent bank. *State, ex rel. Sorensen, v. Citizens State Bank*..... 756
24. Where a trustee purchased valueless notes from a bank of which he was president with trust funds, president's knowledge of trust character of funds *held* im-

putable to the bank. *First Trust Co. v. Exchange Bank* 856
25. Reorganization of an insolvent bank *held* not to estop trustee of fund received by the old bank from recovering the fund from the reorganized bank. *First Trust Co. v. Exchange Bank* 856
26. Where funds wrongfully converted are traced into a bank, a succeeding trustee has election of an action for conversion or a suit to recover the fund and impress a trust on the bank's assets. *First Trust Co. v. Exchange Bank* 856
27. A bank, not designated a depositary, holds deposit of township funds as trustee. *State, ex rel. Sorensen, v. Dwight State Bank* 884

Bills and Notes.

1. Extension of time on obligation of a corporation *held* sufficient consideration for indorsement as surety. *Citizens State Bank v. Arapahoe Flour Mills* 58
2. Defense of want of consideration *held* not sustained. *Citizens State Bank v. Shafer* 60
3. An accommodation maker or surety of a note is not liable to the party accommodated. *Mills v. Mills* 74
4. Whether indorsers signed for accommodation of payee of note *held* a question for the jury. *Mills v. Mills* 74
5. A nonnegotiable note containing the words "for value received" is evidence, not only of the promise, but *prima facie* of the consideration. *In re Estate of Hoagland* 377
6. In action against maker by indorsee of note, where maker pleads and offers evidence tending to show fraud in inception of note, the burden is on indorsee to show that he is a *bona fide* holder. *Standard Investment Co. v. Fisher* 394
7. An action cannot be maintained to recover usurious interest on a note that has been paid. *Waller v. First Trust Co.* 403
8. One induced to sign a note and assignment of insurance policy to bank by suggestion of bank's officer that otherwise her brother would be imprisoned and that she would be involved *held* entitled to cancelation of note and assignment. *Carek v. Schmidt* 591

Bonds.

Ordinarily, no duty rests on holder of a negotiable bond to notify the maker of such ownership; but it is the maker's duty to seek out the holder when making payment. *Davis v. Polak* 640

Charities.

1. Charitable trusts will be enforced in equity courts if possible under rules of law. *Hobbs v. Board of Education* 416
2. Where a denominational college possessed of endowment funds constituting a charitable trust became insolvent, a court of equity could appoint a trustee to administer the trust, or authorize transfer of the fund to an institution of the same general character and denomination, and in doing so the donors' consent, though not controlling, would be given great weight. *Hobbs v. Board of Education* 416
3. Donations to college *held* to constitute a charitable trust not subject to claims of creditors. *Hobbs v. Board of Education* 416
4. The fact that donations are made to an endowment fund without intervention of a trustee will not defeat the trust and invest the donee with absolute title. *Hobbs v. Board of Education* 416
5. Donations to a college for special purposes *held* to constitute charitable trusts. *Hobbs v. Board of Education* 416
6. Donations to an endowment fund conditioned on payment of annuities to the donors are charitable trusts. *Hobbs v. Board of Education* 416
7. Securities and cash withdrawn from a college endowment fund and used for general expenses are converted into general assets, and cannot be restored to the endowment fund to the prejudice of creditors. *Hobbs v. Board of Education* 416
8. Securities and funds contributed from general assets of a college for establishment of a library fund and placed in the endowment fund *held* a part of charitable trust as against creditors. *Hobbs v. Board of Education* 416
9. Donations to a college for buildings and education *held* not to constitute a trust. *Hobbs v. Board of Education* 416

Colleges and Universities.

Property of an educational corporation is liable for its debts. *Hobbs v. Board of Education* 416

Constitutional Law. SEE STATUTES.

1. State railway commission's failure to fix minimum fare for taxicabs *held* not subject to review by a court, it being a legislative power. *In re Yellow Cab & Baggage Co* 138

2. Statute providing for organization of drainage districts *held* not unconstitutional as conferring legislative power on courts. *Mooney v. Drainage District* 219
3. Constitutional amendment changing procedure in suit on contractual liability does not impair obligations of contract and is applicable to existing contracts. *Luikart v. Paine* 251
4. Chapter 110, Laws 1921, relating to utilities districts *held* constitutional. *Murphy v. Metropolitan Utilities District* 663

Contempt.

1. Attempt to prevent foreclosure sale by force is contempt of court. *Lux v. State* 133
2. The mortgage foreclosure moratorium act is not available as a defense to an action for contempt against strangers who forcibly obstructed a foreclosure sale. *Lux v. State* 133
3. An information for constructive contempt may be made on information and belief. *Lux v. State* 133
4. Fines *held* not excessive nor inconsistent. *Lux v. State* 133

Contracts.

1. An offer does not ripen into a contract unless accepted within a reasonable time. *Standard Oil Co. v. O'Hare* 11
2. What constitutes a reasonable time within which an offer may be accepted is a question of fact. *Standard Oil Co. v. O'Hare* 11
3. Communication of acceptance of offer is essential to constitute contract where offer requires promise on part of offeree. *Standard Oil Co. v. O'Hare* 11
4. A written order for purchase of trucks and acceptance thereof amounts to a written contract. *Crook v. O'Shea* 67
5. An acceptance may be transmitted by means authorized by offerer and, if so transmitted, completes the contract as soon as put out of offeree's possession. *Corcoran v. Leon's, Inc.* 149
6. To warrant the reformation of a written instrument, the evidence must be clear, convincing, and satisfactory. *Wheeler v. Brady* 297
7. Any wrongful influence that deprives a person of exercise of free will may amount to duress. *Carek v. Schmidt* 591
8. Consideration of a contract need not move to the promisor, a disadvantage to the promisee being sufficient, although the promisor derives no benefit therefrom. *United States Fidelity & Guaranty Co. v. Curry* 705

Corporations.

1. Creditor *held* to acquire no right in property levied on. *Thies v. Weible* 720
2. Functions of a *de facto* corporation cannot be questioned collaterally. *Thies v. Weible* 720
3. The validity of a mortgage executed by a *de facto* corporation cannot ordinarily be attacked on the ground of want of incorporation. *Thies v. Weible* 720
4. Chattel mortgage of *de facto* corporation *held* valid. *Thies v. Weible* 720

Counties and County Officers.

1. A county is not an insurer of those using a county bridge or road. *Brooks v. Thayer County* 610
2. As between two successive assignees of the same claim against a county, assignee first filing notice of claim *held* entitled to amount due. *Greeley County v. First Nat. Bank* 872

Courts.

1. Filing claim by receiver of insolvent bank in county court for double stock liability against estate of deceased stockholder does not vest county court with exclusive jurisdiction, nor deprive the receiver of the right to proceed in district court. *Parker v. Luehrmann* 1
2. A litigant invoking jurisdiction of a court on a matter within its jurisdiction cannot thereafter object thereto. *In re Estate of Nilson* 541
3. A court reporter is entitled to no fee in addition to the 15 cents per hundred words allowed by statute. *Barton v. Barton* 846
4. A court reporter need not report arguments on motions to perfect pleadings before trial. *Barton v. Barton* 846
5. A court reporter need not report arguments on objections to introduction of evidence. *Barton v. Barton* 846

Criminal Law.

1. Circumstantial evidence, to warrant conviction, must be such as to exclude every reasonable hypothesis except that of defendant's guilt. *Treppish v. State* 21
2. An order excluding prospective witnesses from the courtroom during the trial, except when called to testify, is within the court's discretion. *Treppish v. State* 21
3. Where witnesses, through misunderstanding of court's order, remain in the courtroom during trial, they may

be permitted to testify unless litigant's rights will be prejudiced thereby. *Treppish v. State* 21
4. Reasonable effort of trial court to expedite trial does not constitute reversible error. *Treppish v. State* 21
5. Alleged improper remarks of prosecutor not incorporated in bill of exceptions will not be considered. *Treppish v. State* 21
6. The district court cannot grant a new trial for newly discovered evidence at a term subsequent to term verdict was rendered. *Havens v. State* 125
7. Application for continuance rests in discretion of trial court. *Lux v. State* 133
8. To obtain review of errors occurring at the trial, motion for a new trial must be filed within three days after trial, except for cause of newly discovered evidence. *Hoover v. State* 277
9. Only judgments and sentences on convictions for felonies and misdemeanors under the Criminal Code may be brought to the supreme court by petition in error. *Hoover v. State* 277
10. An erroneous instruction is not ground for reversal unless prejudicial to complaining party. *Foreman v. State* 619
11. All instructions given must be considered in determining whether a particular instruction is prejudicial. *Foreman v. State* 619
12. An instruction should not point out and emphasize particular testimony. *Foreman v. State* 619
13. Evidence of similar crimes is admissible when it tends to prove a particular criminal intent necessary to constitute the crime charged; whether such crimes are too remote rests within discretion of trial court. *Foreman v. State* 619

Damages.

1. Damages of $1,900 for personal injuries *held* not excessive. *Mischo v. Von Dohren* 164
2. Question of permanency of injury *held* for the jury. *Mischo v. Von Dohren* 164
3. Verdict of $3,000 for personal injuries *held* not excessive. *Thomas v. Haspel* 255
4. Threats, in attempt to collect a debt, *held* to authorize recovery for mental pain and suffering, though no physical injury resulted. *LaSalle Extension University v. Fogarty* 457
5. Assessment of damages is province of jury, and if it appears that the verdict is not excessive, or the result

of caprice, passion, or prejudice, courts will not disturb it, unless it is unjust as a matter of law. *Mangiameli v. Ariano* 629

Death.

1. Presumption of death arises from the continued and unexplained absence of a person for seven years. *Fredrikson v. Massachusetts Mutual Life Ins. Co* 240
2. Evidence, in action on insurance policy, *held* to create presumption of death of absentee, founded on a reasonable probability, while on an automobile journey of special peril. *Munson v. Provident Mutual Life Ins. Co.* 773
3. Presumption of continued life of an absentee continues for seven years, but seven years of unexplained absence raises presumption that absentee is dead. *Munson v. New England Mutual Life Ins. Co* 775
4. Presumption of death after seven years' absence requires that party asserting that absentee is alive must prove it. *Munson v. New England Mutual Life Ins. Co.* 775
5. One asserting that absentee died in less than seven years must prove it. *Munson v. New England Mutual Life Ins. Co* 775
6. To raise presumption of absentee's death at time less than seven years, facts and circumstances of special peril must be shown which make it more probable that absentee died at a particular time than that he survived. *Munson v. New England Mutual Life Ins. Co.* 775
7. Presumption of absentee's death, founded on reasonable probability, must prevail against mere possibilities. *Munson v. New England Mutual Life Ins. Co* 775
8. Evidence, in action on insurance policy, *held* to create presumption of death of assured. *Munson v. New England Mutual Life Ins. Co* 775

Deeds.

Evidence *held* not to justify reformation of deed testamentary in character so as to make the deed an absolute conveyance with reservation of life estate in grantor. *Wheeler v. Brady* 297

Depositaries.

Mere acquiescence of a township board after knowledge that township funds have been deposited in a bank will not constitute the bank a legal depositary. *State, ex rel. Sorensen, v. Dwight State Bank* 388

Discovery.

Statutory requirements as to petitions and answers prevent incorporation of essential elements upon which discovery, as it formerly existed, was based. *Marshall v. Rowe* 817

Divorce.

1. In litigation between divorced parents over custody of a minor child, the determining issue is the best interests of the child. *Bradley v. Bradley* 52
2. A divorce decree awarding the father custody of a minor child may, after change of conditions, be modified to award custody to the mother, if for best interests of child. *Bradley v. Bradley* 52
3. Award of alimony *held* inadequate. *Barton v. Barton* 835

Drains.

1. A drainage district must maintain its drainage system so that landowners whose lands were assessed for construction of the system on the basis of expected benefits may be protected in enjoyment of such benefits. *Mooney v. Drainage District* 219
2. The word "may" in section of drainage act pertaining to assessments for repairs *held* mandatory. *Mooney v. Drainage District* 219
3. Enlargement of outlet of drainage system is "improvement and repair" within the statute requiring a drainage district to keep its system in condition. *Mooney v. Drainage District* 219

Eminent Domain.

1. Waiver of damages procured by material misrepresentations on which grantor relied is voidable at option of grantor, and may be rescinded at any time before it is acted on by grantee. *Kline v. Department of Public Works* 587
2. A waiver executed without consideration may be withdrawn at any time before it is acted on. *Kline v. Department of Public Works* 587
3. A landowner permitting an irrigation company to enter on his land and construct an irrigation canal cannot enjoin use of canal, but must seek his remedy in damages. *Regouby v. Dawson County Irrigation Co.* 711
4. An owner of land appropriated for an irrigation canal is entitled to compensation for land appropriated and special damages for diminution in value of the remainder, less special benefits, but general benefits are

not deductible. *Regouby v. Dawson County Irrigation Co.* 711
5. In an action for damages against an irrigation company for land appropriated, additional damage because of negligent construction of canal can be recovered. *Regouby v. Dawson County Irrigation Co.* 711
6. Act relating to creation of public power and irrigation districts *held* not invalid as authorizing condemnation and taking private property for public use without just compensation, or without giving the owner thereof his day in court. *State, ex rel. Loseke, v. Fricke* 736

Equity.
1. Equity relief is dependent on present and future conditions rather than solely on those existing when the suit was brought. *Chizek v. City of Omaha* 333
2. Laches should be pleaded to be available as a defense. *Kline v. Department of Public Works* 587
3. Doctrine of laches has no application where parties upon whom rests the duty of prosecuting an action for the recovery of trust funds were the wrong-doers. *First Trust Co. v. Exchange Bank* 856

Escheat.
1. "Escheat" defined. *In re Estate of O'Connor* 182
2. When tenancy of ownership expires by reason of failure of the law or the state to recognize any one in whom such tenancy can be continued, the state does not take as a successor under the law of descent, but as reversioner. *In re Estate of O'Connor* 182

Estoppel.
1. A municipality is not estopped by the unauthorized acts of an officer of limited authority. *City of Cozad v. Thompson* 79
2. Where a statute prohibits a village treasurer from depositing village funds in any bank not designated a depositary, the village is not estopped by act of treasurer from asserting illegality of deposit. *State, ex rel. Sorensen, v. Plateau State Bank* 407
3. "Waiver" is intentional relinquishment of a known right, and there must be both knowledge of existence of the right and intention to relinquish it. *Klanecky v. Woodmen of the World* 809
4. Where a principal entrusted an agent with apparent ownership of a claim for collection, a *bona fide* purchaser of the claim from the agent acquired title thereto. *Greeley County v. First Nat. Bank* 872

5. Where one of two innocent persons must suffer by the wrongful act of a third person, the one who made it possible for the third person to commit the act should bear the loss. *Greeley County v. First Nat. Bank* 872

Evidence.

1. In action for personal injuries, admission in evidence of Carlisle table of expectancy *held* not error. *Mischo v. Von Dohren* 164
2. Finding that plaintiff was driving on wrong side of highway *held* contrary to undisputed physical facts. *Elwood v. Schlank* 213
3. Nonexpert witnesses may testify as to whether an injured person with whom they were familiar appeared to be suffering pain, and as to the appearance of her injuries. *Thomas v. Haspel* 255
4. "*Prima facie* case" defined. *In re Estate of Hoagland* 377
5. Question as to opinion of mental expert as to mental condition of deceased *held* proper. *In re Estate of Crosby* 509
6. "*Res gestæ*" defined. *Roh v. Opocensky* 518
7. Spontaneous exclamations closely connected with transaction *held* admissible as *res gestæ*. *Roh v. Opocensky* 518
8. *Res gestæ* declarations of agent made while engaged in business of principal are admissible against principal. *Roh v. Opocensky* 518
9. A nonexpert may give his opinion concerning the mental condition of a person with whom he had an extended and intimate acquaintance. *Kehl v. Omaha Nat. Bank* 695
10. Records made by a person in the ordinary course of his business of acts which his duty, in such business, requires him to do for others are, in case of his death, admissible evidence of such acts. *Kehl v. Omaha Nat. Bank* 695

Execution.

A creditor, by the levy of an execution, acquires no greater rights in property levied on than the judgment debtor had. *Thies v. Weible* 720

Executors and Administrators.

1. "Contingent claim" defined. *Parker v. Luehrmann* 1
2. An action against distributees of an estate to recover property liable for debts is not an original action, but a special proceeding for collection of a claim allowed in the county court. *Parker v. Luehrmann* 1

3. The administrator of the estate of a deceased bank stockholder is a proper party defendant in an action by receiver to enforce double stock liability. *Parker v. Luehrmann* 1
4. A decree of final accounting only discharges an administrator from past liability. *Parker v. Luehrmann* 1
5. Claimant must support a claim against an estate based on a nonnegotiable note containing the words "for value received" by proof of its execution and delivery. *In re Estate of Hoagland* 377
6. Time devoted by attorneys to duties performed for administrator at an arbitrary charge for a day's service is not necessarily the measure of compensation allowable by the court. *In re Estate of Rhea* 571
7. In proceedings to settle an estate, the administrator and his attorneys are officers of the court and both are fiduciaries in their relation to heirs. *In re Estate of Rhea* 571
8. An administrator is a trustee, and property in his hands as such is trust property under control of the court. *In re Estate of Rhea* 571
9. A deceased's estate is subject to legitimate expenses of administration, including proper attorney's fees, but fiduciaries who take part in execution of the trust must be diligent in protecting the trust property from fraudulent or excessive claims and from misappropriations. *In re Estate of Rhea* 571
10. Services of an administrator and his attorneys in settling an estate are subject to judicial scrutiny and review. *In re Estate of Rhea* 571
11. Opinions of experts as to the value of attorney's services to an administrator must be considered in fixing attorney's fees, but are not necessarily binding on the court. *In re Estate of Rhea* 571
12. Matters a court may consider in determining attorney's fees for services performed for an administrator and heirs in settlement of an estate. *In re Estate of Rhea* 571
13. A fee for attorney's services to an administrator in his individual capacity is not chargeable against the estate. *In re Estate of Rhea* 571
14. Acts performed as an individual cannot operate as an estoppel against an administrator in his representative capacity. *State, ex rel. Sorensen, v. Citizens State Bank* 756

Exemptions.

1. Ninety per cent. only of wages due a judgment debtor

is exempt from garnishment in aid of execution on a judgment rendered for other than necessaries. *Lyons v. Austin* 248
2. Whether property in the hands of a garnishee is exempt is to be determined as of the date of service of garnishee summons. *Scottsbluff Nat. Bank v. Pfeifer* 852
3. Application claiming $500 of fund garnisheed exempt in lieu of homestead, but not stating that debtor had no lands, town lots nor houses subject to exemption as a homestead on date garnishee summons was served, *held* insufficient. *Scottsbluff Nat. Bank v. Pfeifer*..... 852
4. A debtor who fails to claim exemption before judgment disposing of money garnisheed is bound by the judgment. *Scottsbluff Nat. Bank v. Pfeifer*..... 852

False Imprisonment.

1. In an action for false imprisonment against an officer for arresting without a warrant, in absence of conflict in evidence as to time and circumstances under which plaintiff was held, the reasonableness of the detention is for the court. *Kausgaard v. Endres*..... 129
2. Where evidence is sufficient to support verdict for damages for false imprisonment, whether defendant's acts amounted to false imprisonment *held* question for jury. *Dillon v. Sears-Roebuck Co*..... 357
3. To constitute "false imprisonment" there must be restraint of person, but restraint may be by threat as well as by force, if reasonable apprehension of fear of injury to person, reputation, or property is induced. *Dillon v. Sears-Roebuck Co*..... 357
4. A principal is liable for false imprisonment committed by agent within the scope of his authority. *Dillon v. Sears-Roebuck Co*..... 357
5. District manager and manager of local store *held* to act within scope of authority in investigating or permitting investigation of employee as to fidelity and honesty. *Dillon v. Sears-Roebuck Co*..... 357
6. One who aids or assists in unlawful imprisonment of another is liable as principal. *Dillon v. Sears-Roebuck Co.* 357
7. Where an employer contracts with another for the purpose of investigating employees, and employer's agents assist the contractor's agent in illegal restraint of an employee, the employer is liable for false imprisonment. *Dillon v. Sears-Roebuck Co*..... 357

Fraud.

1. Fraud is never presumed. *Burnham v. Bennison*..... 312

2. Where fraudulent promises act as inducement to execution of a written contract, the remedy is for fraud, and not on the oral promises as a contractual obligation. *Crook v. O'Shea* 67
3. An action for damages for breach of contract for failure to furnish employment will not lie where the agreement to furnish employment was in the nature of oral inducements to execution of a written contract for purchase of trucks. *Crook v. O'Shea* 67

Fraudulent Conveyances.

1. Evidence *held* insufficient to establish that husband's conveyance to son was made for purpose of fraudulently depriving the wife of her marital rights. *Perry v. Neel* 106
2. Husband's transfer of property to wife preventing his creditors from enforcing payment of their claim is presumptively fraudulent as to them; and burden is on wife to prove otherwise. *Luikart v. Tidrick* 398
3. A *bona fide* debt from husband to wife is a sufficient consideration to support conveyance of property as security for the debt. *Luikart v. Tidrick* 398
4. Wife *held* not estopped by misrepresentation, silence or laches from claiming property conveyed by husband as security for debt. *Luikart v. Tidrick* 398
5. An insolvent debtor may in good faith pay or secure valid debt of one creditor to exclusion of others. *Luikart v. Tidrick* 398

Guardian and Ward.

The county court is a court of record and of original jurisdiction in matters regarding appointing and directing of a guardian and its judgment is not open to collateral attack merely because it does not recite jurisdictional facts. *Crespin v. Wilcox* 349

Highways.

1. At common law, counties are not liable for damages arising out of defects in roads or bridges. *Franek v. Butler County* 797
2. Counties under township organization are not liable for damages arising out of defects in a road or bridge, unless the particular road has been designated as a county road or the bridge passes over a stream. *Franek v. Butler County* 797

Homicide.

1. Evidence *held* not to sustain verdict of murder in second degree. *Treppish v. State* 21

2. *Corpus delicti* of homicide is not established until it is proved that a human being is dead, and that death occurred as the result of the criminal agency of another. *Treppish v. State* 21
3. Where one dies suddenly, it is presumed that death resulted from natural causes and not from a criminal act. *Treppish v. State* 21

Husband and Wife.
1. Public support of a wife in an insane asylum *held* not to release her husband from his legal obligation to support her. *Harrison v. Cargill Commission Co* 185
2. Deposit of money by a wife in a bank payable to herself or husband as joint tenants with right of survivorship constituted a gift to the husband. *Kehl v. Omaha Nat. Bank* 695
3. A deposit by a wife payable to herself and husband *held* presumptively with donative intent. *Kehl v. Omaha Nat. Bank* 695

Indemnity.
1. Consideration sufficient for any other kind of a contract is sufficient for a contract of indemnity. *United States Fidelity & Guaranty Co. v. Curry* 705
2. Agreements of indemnity made subsequent to execution of an indemnity bond are not void for want of consideration where the consideration is of a continuing nature. *United States Fidelity & Guaranty Co. v. Curry* 705

Injunction.
1. Injunction will not lie to obtain possession of realty where legal remedies are adequate. *Standard Oil Co. v. O'Hare* 11
2. One seeking injunction must establish every controverted fact necessary to relief. *Chizek v. City of Omaha* 333

Insurance.
1. Insurer failing to set up a condition precedent contained in policy sued on and failing to allege its breach by insured waived such defense. *Lehnherr v. National Accident Ins. Co* 199
2. Evidence *held* to establish that insured sustained compensable accidental injury. *Lehnherr v. National Accident Ins. Co* 199
3. Where a policy provided that the policy should be void if assigned without insurer's consent, an assignment

without insurer's consent *held* void. *Connolly v. Providence Washington Ins. Co.* 303
4. Insurer's consent to assignment of policy is void where consent is obtained after fire without notice of the fire. *Connolly v. Providence Washington Ins. Co.* 303
5. The word "embezzlement" in a fidelity bond will be construed in its popular sense. *Luther College v. Benson* 410
6. Under a fidelity bond providing that, in event of loss exceeding amount of suretyship, employer and surety should share *pro rata* in net recovery in the proportion that amount of payment under suretyship bore to total shortage, the surety, until it had made payment, was not entitled to share in recovery, unless net recovery reduced amount of loss to a sum less than amount of suretyship. *Luther College v. Benson* 410
7. A fidelity bond being a form of insurance, judgment thereon need not designate principal and surety. *Luther College v. Benson* 410
8. An agreement for immediate cancelation of a fire insurance policy without giving five days' notice required by policy can be made, and may be established by acts and conduct. *McRae v. Mercury Ins. Co.* 469
9. Acquiescence in notice of cancelation of fire policy *held* to estop insured from asserting that the policy is still in force. *McRae v. Mercury Ins. Co.* 469
10. Untrue answers in application for disability insurance *held* to void the contract. *Scott v. New England Mutual Life Ins. Co.* 514
11. "Bodily infirmity" sufficient to avoid an insurance policy by its omission from the application must produce some real defect amounting to an inroad on physical health or impairing bodily or mental powers. *McClure v. World Ins. Co.* 676
12. Scars from gasoline burns *held* not an "infirmity" sufficient to avoid an accident policy. *McClure v. World Ins. Co.* 676
13. Evidence *held* to establish that insured had paid premium on policy, and was entitled to return of unearned portion of premium on cancelation of policy. *McAllister v. Maryland Casualty Co.* 789
14. An offer by a benefit society to a suspended member, to permit his reinstatement on conditions stated, does not waive forfeiture of the benefit certificate where there was no compliance with the conditions named. *Klanecky v. Woodmen of the World* 809

15. Mailing by benefit society of blanks for proof of death to secretary of local camp *held* not waiver of forfeiture of benefit certificate. *Klanecky v. Woodmen of the World* 809
16. Letter by benefit society stating that blanks for proof of death have been forwarded, but reciting that right of approval of proof is reserved to the society, *held* not to constitute waiver of forfeiture of benefit certificate. *Klanecky v. Woodmen of the World* 809

Joint Tenancy.

Statute relating to payment of deposits payable to two or more fixes the property right unless the contrary appears from the terms of the deposit. *Kehl v. Omaha Nat. Bank* 695

Judges.

1. A county judge is liable on his official bond for trust funds lost by reason of insolvency of bank, notwithstanding he acted in good faith and without negligence in selection of a depositary. *Knox County v. Cook* 477
2. A county judge cannot set off amount paid as premium for his official bond against county's claim for unreported fees, where claim for premium has not been presented to and allowed by the county board. *Knox County v. Cook* 477

Judgment.

1. A party pleading a former adjudication has the burden of proving it. *Western Public Service Co. v. Wheeler County* 120
2. A judgment or decree on the merits conclusively settles, as between parties and privies, any right, fact, or matter in issue directly adjudicated or necessarily involved in the determination of the action. *Wheeler v. Brady* 297
3. An adjudication in a suit to quiet title that a deed was testamentary in character is not *res judicata* to a suit to reform the instrument. *Wheeler v. Brady* 297

Judicial Sales.

1. A judicial sale of realty will not be set aside for inadequacy of price unless so gross as to show fraud or mistake. *Howells State Bank v. Hardes* 356
2. Successful bidder at judicial sale becomes a party and may urge confirmation or show cause for release from his obligation, and may appeal from order of confirmation. *State, ex rel. Sorensen, v. Denton State Bank* 486

Jury.

1. The constitutional right to trial by jury is a personal privilege which the litigant may waive. *Berg v. Griffiths* 235
2. Ineligibility of juror *held* not waived where juror failed to disclose his ineligibility. *Berg v. Griffiths*..... 235

Landlord and Tenant.

1. Purported lease and agency agreement made at same time with reference to same subject and to effectuate same purpose *held* construable together. *Standard Oil Co. v. O'Hare*..... 11
2. Purported lease and agency agreement *held* to constitute an offer required to be accepted within a reasonable time to constitute a contract. *Standard Oil Co. v. O'Hare*..... 11
3. Notice of acceptance of lease alone *held* not notice of acceptance of lease and agency agreement, and notice of acceptance of agency agreement five months after offer was not within a reasonable time. *Standard Oil Co. v. O'Hare*..... 11
4. A tenancy from year to year will be presumed where tenant remains in possession after expiration of term and his tenancy is recognized by the landlord, but the presumption is rebuttable. *Corcoran v. Leon's, Inc*..... 149
5. Evidence *held* to rebut presumption of continuing tenancy. *Corcoran v. Leon's, Inc*..... 149

Liens.

1. An equitable lien will not arise in favor of one loaning money to pay the purchase price of realty, in absence of agreement to give a lien. *Perry v. Neel*..... 106
2. Statute providing for lien for work on personalty *held* not to entitle a farm hand to lien on crops. *Taylor v. Luedke* 602

Limitation of Actions.

1. Payment on note after maturity but before statute of limitations has run tolls the statute. *Kienke v. Hudson* 551
2. Payment on note through arrangement of maker *held* to toll the statute of limitations. *Kienke v. Hudson*..... 551
3. Payment on note by one joint maker with knowledge and consent of the other out of funds in which they are jointly interested tolls the statute of limitations as to each maker. *Kienke v. Hudson*..... 551
4. A domestic judgment is a specialty within five-year statute of limitations. *Farmers & Merchants Bank v. Merryman* 684

5. Petition in action on a domestic judgment *held* to sufficiently plead facts to toll statute of limitations. *Farmers & Merchants Bank v. Merryman* 684
6. In an action on a domestic judgment that appears on the face of the petition to be barred by the statute of limitations, but which contains allegations tolling the statute because of absence of defendant from the state, plaintiff need not plead the foreign residence of defendant and facts showing that the action is not barred by the law of that state, which is matter of defense. *Farmers & Merchants Bank v. Merryman* 684
7. An action for relief on the ground of fraud must be commenced within four years after discovery of the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on inquiry, which, if pursued, would lead to such discovery. *Branham v. Ayers* 688
8. Whether a litigant is possessed of information, which, if pursued, would lead to discovery of fraud, is a question of fact. *Branham v. Ayers* 688
9. Suit to set aside conveyance *held* barred by limitations. *Marshall v. Rowe* 817
10. Running of statute of limitations *held* tolled as against fraudulent acts of trustee. *First Trust Co. v. Exchange Bank* 856

Marriage.

Statute prohibiting common-law marriage *held* not retroactive. *Harrison v. Cargill Commission Co* 185

Master and Servant.

1. In an action for compensation, evidence *held* to sustain finding that neither emancipation of minor son nor direct contract of hire had been established. *Holt County v. Mullen* 102
2. The workmen's compensation law should be liberally construed to give effect to its purposes. *Harrison v. Cargill Commission Co* 185
3. The purpose of the workmen's compensation law is to shift to industry the burden of loss from accidents. *Harrison v. Cargill Commission Co* 185
4. A wife involuntarily confined in an insane asylum *held* to be "living" with her husband at time of his death in an industrial accident, within the meaning of the workmen's compensation law. *Harrison v. Cargill Commission Co* 185

5. Acts for which master is responsible set out. *LaFleur v. Poesch* 263
6. Whether salesman was acting within the scope of his employment when killed in automobile collision *held* question for jury. *LaFleur v. Poesch* 263
7. "Collective labor agreement" and "trade agreement" between employees and employers *held* a binding contract when made part of individual contract of each employee, breach of which gives rise to a cause of action. *Rentschler v. Missouri P. R. Co* 493
8. A collective labor agreement should be broadly construed. *Rentschler v. Missouri P. R. Co* 493
9. An employee is not deprived of right to seek redress in courts because his contract of employment contained a provision for arbitration of disputes. *Rentschler v. Missouri P. R. Co* 493
10. Evidence in action for personal injuries *held* to disclose no actionable negligence. *Anderson v. Svehla* 584
11. In absence of master's negligence, servant assumes obvious and known risks of injury incident to employment. *Anderson v. Svehla* 584
12. A compensation award is final, except that it may be modified on application of either party, at any time after six months from rendition, for change in disability. *Metropolitan Dining Room v. Jensen* 765
13. Application to modify a compensation award for change in disability must be made to the court that made the award. *Metropolitan Dining Room v. Jensen* 765
14. A compensation case will be tried *de novo* in the supreme court. *Metropolitan Dining Room v. Jensen* 765
15. Mistake is not ground for modifying a compensation award. *Metropolitan Dining Room v. Jensen* 765
16. Employee asking compensation has the burden of proof. *Metropolitan Dining Room v. Jensen* 765
17. Applicant seeking to modify a compensation award has the burden of proof. *Metropolitan Dining Room v. Jensen* 765

Mortgages.

1. A mortgage reciting that it is subject to an existing prior mortgage estops the mortgagee, in absence of special equities, from questioning the validity of such prior mortgage. *Old Line Ins. Co. v. Stark* 96
2. Extension of time of payment of mortgage by first mortgagee *held* not to give priority to second mortgage. *Hajek v. Pojar* 386

3. Recording of assignment of mortgage securing negotiable bond is not constructive notice to mortgagor of such assignment, but only to subsequent purchasers and encumbrancers. *Davis v. Polak* 640
4. A mortgage prohibiting bondholders from instituting suit, except under certain conditions, is not a limitation of rights of bondholders to protect their interests by intervening in foreclosure proceedings. *Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co* 744
5. Provision in a mortgage permitting a trustee to bid in property at foreclosure sale and to manage the property for the benefit of the bondholders *held* valid and to inure equally to the benefit of all bondholders. *Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co* 744
6. A decree permitting the trustee to buy the property at foreclosure sale for the benefit of all bondholders without liability to account for or distribute cash to bondholders *held* valid. *Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co* 744
7. If a trustee purchases the property at foreclosure sale for the benefit of bondholders, sale of the property thereafter must be approved by the court, thereby protecting the bondholders. *Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co* 744
8. Evidence *held* to establish that land sold at mortgage foreclosure sale at price not grossly inadequate, and that method of sale complied with law. *State Savings & Loan Ass'n v. Martin* 795

Municipal Corporations.

1. A city treasurer and surety *held* liable for city moneys lost through insolvency of bank of which he was an officer. *City of Cozad v. Thompson* 79
2. A judgment and sentence for violation of a city ordinance not embracing a statutory offense is reviewable only by appeal. *Hoover v. State* 277
3. A private person cannot enjoin laying of gas mains in streets unless he shows special injury to himself. *Chizek v. City of Omaha* 333
4. Cost of water main may be levied on property specially benefited, if not in excess of benefits, and may be levied according to foot frontage where benefits are equal and uniform. *Murphy v. Metropolitan Utilities District* 663
5. Finding of board of directors of a metropolitan utilities district sitting as a board of equalization of special

assessments is in the nature of a judgment of a court, reviewable only in a direct proceeding. *Murphy v. Metropolitan Utilities District* 663
6. Grant of power to a metropolitan utilities district to extend water mains beyond the city limits has the effect to enlarge boundaries of district to include territory to be served by such extension. *Murphy v. Metropolitan Utilities District* 663
7. Provision in chapter 110, Laws 1921, for notice of formation of a water main district and sitting of board of equalization of special taxes *held* to meet requirements of due process of law. *Murphy v. Metropolitan Utilities District* 663
8. Finding by board of equalization levying special assessments that lands are benefited to amount of assessments is tantamount to a finding that benefits are equal and uniform, warranting adoption of the foot front rule. *Murphy v. Metropolitan Utilities District* 663
9. In pedestrian's action against municipality for injuries sustained when pedestrian stepped on a water-meter box cover in parkway strip, evidence *held* insufficient to sustain verdict against city. *Gates v. City of North Platte* 785
10. A municipality must take cognizance of fact that pedestrians have occasion to walk on parking strip along street, and must exercise due care to have such area in reasonably safe condition. *Gates v. City of North Platte* 785
11. A municipality is not an insurer against all injury which may result from obstructions or defects in parkways. *Gates v. City of North Platte* 785
12. In absence of actual notice, municipality is not ordinarily liable for failing to discover existence of defect in manhole cover which has been properly constructed, regularly inspected, and was apparently safe and secure. *Gates v. City of North Platte* 785

Negligence.

1. Contributory negligence of plaintiffs' decedent *held* more than slight when compared with the negligence of defendant, precluding recovery for death. *Troup v. Porter* 93
2. Where driver and occupant of automobile were engaged in a joint enterprise, negligence of driver in operation of automobile *held* imputable to occupant. *Zajic v. Johnson* 191

3. Whether deceased motorist was guilty of contributory negligence barring recovery under comparative negligence statute *held* question for jury. *LaFleur v. Poesch* 263
4. The degree of negligence comprehended by the comparative negligence statute is not ordinarily applicable in actions involving the motorists' guest statute. *Sheehy v. Abboud* 554
5. In action for injury caused by defective highway, an instruction misstating the law as to contributory negligence was not cured by another instruction stating the law correctly. *Brooks v. Thayer County* 610

New Trial.

1. Motion for new trial for newly discovered evidence must be made at term verdict, report or decision was rendered. *State, ex rel. Sorensen, v. Commercial State Bank* 482
2. Application for new trial after adjournment *sine die* of term at which judgment was rendered is controlled by statute. *State, ex rel. Sorensen, v. Commercial State Bank* 482
3. After time for filing motion for new trial has expired, motion cannot be amended by assigning new grounds, except upon finding that party was unavoidably prevented from presenting the matter contained in amendment. *State, ex rel. Sorensen, v. Commercial State Bank* 482

Notice.

One put on inquiry is chargeable with notice of all such facts as he would have learned by reasonable inquiry. *Marshall v. Rowe* 817

Nuisance.

A private person seeking to enjoin a public nuisance must show special injury to himself. *Chizek v. City of Omaha* 333

Parties.

A court of equity may allow intervention after decree to protect rights in mortgage foreclosure proceedings. *Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co.* 744

Physicians and Surgeons.

1. An error of judgment may be so gross as to be inconsistent with the degree of skill and care that it is the duty of a dental surgeon to use. *Mangiameli v. Ariano* 629
2. Rules governing duty and liability of physicians and surgeons in performance of professional services are applicable to dentist. *Mangiameli v. Ariano* 629

Pleading.

1. The trial court has reasonable discretion in allowance of amendments of pleadings. *Holt County v. Mullen*.... 102
2. Defendant must deny specifically the performance of a particular condition relied on as a defense to an action on a contract. *Lehnherr v. National Accident Ins. Co.* 199
3. A defense not pleaded cannot be considered in the decision of the case. *Lehnherr v. National Accident Ins. Co.* 199
4. Permission to amend a pleading to conform to evidence is within the court's discretion, and to predicate error thereon, abuse of discretion must appear from the record. *Thomas v. Haspel*..... 255
5. General allegations of conspiracy and of resulting damage are insufficient to state a cause of action if they are negatived by other allegations and the law applicable thereto. *Crespin v. Wilcox*..... 349
6. If defendant desires affirmative relief, he should plead the ultimate facts to support his contention; but, if they are pleaded by plaintiff, an affirmative judgment in defendant's favor may be sustained. *In re Estate of Nilson* 541
7. Amendment of a petition after trial, judgment, appeal and reversal, cannot be allowed if it amounts to a departure introducing a new cause of action barred by the statute of limitations. *Hensley v. Chicago, St. P., M. & O. R. Co*..... 579
8. The purpose of an answer is to notify the court and plaintiff of the defense relied on. *Marshall v. Rowe* 817
9. A general denial is permissible if defendant *bona fide* challenges a single element of those elements essential to plaintiff's recovery, and it will not be interpreted as a response to search of conscience of defendant, and does not possess the character of evidence; its sole effect being to put plaintiff to proof of allegations of his pleading. *Marshall v. Rowe*..... 817
10. Statutory provisions pertaining to compulsory discovery by parties to action do not relate to subject of pleadings. *Marshall v. Rowe*..... 817
11. A petition, the sufficiency of which is first raised after issues joined, by objection to introduction of evidence or demurrer *ore tenus*, will be liberally construed, and, if possible, sustained. *First Trust Co. v. Exchange Bank* 856

Pledges.

Evidence *held* to establish fraud in procuring a guaranty

and pledge of collateral. *State, ex rel. Sorensen, v. State Bank of Omaha* 343

Principal and Agent.

1. One who pays a negotiable bond secured by mortgage to the mortgagee who does not have possession of the bond has the burden of proving authority of mortgagee to receive payment. *Davis v. Polak* 640
2. Evidence *held* not to constitute bank ostensible agent of holder of bond to collect principal. *Davis v. Polak* 640
3. Authority of agent to collect interest coupons affords no implication of authority to collect the principal. *Conroy v. Garries* 730
4. The fact that the party to whom a note is paid did not have the note in his possession is not conclusive on question of authority to collect. *Conroy v. Garries* 730
5. Where, in course of dealings between mortgagee and assignee of note and mortgage, the mortgagee collects principal and interest for the assignee, mortgagee's authority to collect other notes as agent of assignee may be implied. *Conroy v. Garries* 730

Property.

"Ownership of real estate" defined. *In re Estate of O'Connor* 182

Rape.

To sustain conviction for rape, there must be corroboration of prosecutrix in some material respect, but corroboration as to the identity of accused is unnecessary. *Havens v. State* 125

Schools and School Districts.

1. School district treasurer may lawfully deposit school district funds in a bank duly designated as a depositary. *State, ex rel. Sorensen, v. Farmers & Merchants Bank* 245
2. Action taken by majority of school district board will not bind the district, in absence of notice to or participation therein by other members. *State, ex rel. Sorensen, v. Commercial State Bank* 482

State Railway Commission.

Granting of continuance of hearing is within the discretion of the state railway commission. *In re Yellow Cab & Baggage Co.* 138

Statutes. SEE CONSTITUTIONAL LAW.

1. Section of drainage act pertaining to assessments *held* not an inducement to passage of the act. *Mooney v. Drainage District* 219
2. Statute relating to application of fund derived from delinquent taxes *held* unconstitutional. *State, ex rel. Beal, v. Bauman* 566
3. Provisions of statutes governing metropolitan cities pertaining to method of making levy and assessment of special taxes to pay cost of water mains were incorporated by reference into chapter 110, Laws 1921, relating to utilities districts. *Murphy v. Metropolitan Utilities District* 663
4. An enrolled bill, signed by the presiding officer of each house of the legislature and approved by the governor, imports verity as to its passage, and its passage can be nullified only by affirmative showing in legislative journals that the bill was not passed in constitutional manner. *State, ex rel. Loseke, v. Fricke* 736
5. The rule that the singular number often includes the plural in construction of statutes is applicable where the senate passed a bill and the house amended it in several particulars, and returned the amended bill to the senate, and the journals of the latter showed concurrence in the "amendment." *State, ex rel. Loseke, v. Fricke* 736
6. Act relating to creation of public power and irrigation districts *held* not unconstitutional on the ground that title to the act contains more than one subject. *State, ex rel. Loseke, v. Fricke* 736
7. Provisions of power and irrigation act *held* not in conflict. *State, ex rel. Loseke, v. Fricke* 736
8. That powers granted under the act relating to public power and irrigation districts to raise revenue may prove inadequate, *held* insufficient ground for holding the act invalid. *State, ex rel. Loseke, v. Fricke* 736

Subrogation.

A surety who pays the debt of his principal may by subrogation acquire collateral to the debt and sue thereon. *Larson v. Bumann* 85

Taxation.

1. Payment of tax which must be made as a condition precedent to suit to recover void tax is not "voluntary." *Western Public Service Co. v. Wheeler County* 120

2. An owner of realty may sue to recover void taxes paid by him, whether levied while he was owner or prior thereto. *Western Public Service Co. v. Wheeler County* 120
3. Petition *held* to state a cause of action for recovery of void tax. *Western Public Service Co. v. Wheeler County* 120
4. The supreme court will take judicial notice that realty was assessable in 1926, and every four years thereafter. *Western Public Service Co. v. Wheeler County* 120
5. Except in cases where realty becomes subject to assessment or where improvements worth more than $100 have been added, a precinct assessor is without authority to assess realty at any time other than the regular assessment year. *Western Public Service Co. v. Wheeler County* 120
6. The county board of equalization alone, but only on notice, may in proper cases in a year other than a regular assessment year equalize the value of individual parcels of realty. *Western Public Service Co. v. Wheeler County* 120
7. Realty escheating to the state is not subject to inheritance tax, since inheritance tax is assessed on succession and not on reversion. *In re Estate of O'Connor* 182
8. If first instalment of general personal taxes is paid before it becomes delinquent December first, the second instalment does not become delinquent or bear interest until the following July first. *Lincoln Telephone & Telegraph Co. v. Albers* 329
9. Refusal to reduce assessment on farm land in year in which realty of county was not assessed *held* proper. *Sloan v. Fillmore County* 524
10. A taxpayer claiming that realty is assessed too high must apply to the board of equalization for relief, and if relief is denied, appeal lies to the courts. *Power v. Jones* 529
11. The claim that realty is assessed too high cannot be made for the first time in a collateral attack against collection of the tax. *Power v. Jones* 529

Trial. SEE APPEAL. CRIMINAL LAW.
1. Instructions must be considered together. *Whinnery v. Interstate Transit Lines* 61
2. In an action for personal injuries, failure to instruct on unavoidable accident *held* not error, in absence of request therefor, where the jury were properly instructed as to the burden of proving the negligence charged. *Thomas v. Haspel* 255

3. Requested instruction, giving undue prominence to a portion of the testimony by special reference thereto and commenting on its weight, *held* properly refused. *Thomas v. Haspel* 255
4. Where there is any testimony which will sustain a finding for the party having the burden of proof, the trial court cannot disregard it and direct a verdict against him. *LaFleur v. Poesch* 263
Kehl v. Omaha Nat. Bank 695
5. The trial court should direct verdict for defendant where evidence is insufficient to sustain a verdict against him. *Haynes v. Norfolk Bridge & Construction Co.* 281
6. The statute requiring plaintiff, after a jury has been impaneled, to state his "claim," and permitting him to state the evidence, does not necessitate statement of a "cause of action," nor require recital of all evidence relied on to establish the claim. *Temple v. Cotton Transfer Co.* 287
7. The opening statement of plaintiff's attorney will not ordinarily be regarded as a formal admission made for the purpose of dispensing with formal proof of a fact at the trial. *Temple v. Cotton Transfer Co.* 287
8. The practice of directing entry of nonsuit, dismissal of the action, or of directing a verdict, at close of opening statement to the jury is disapproved. *Temple v. Cotton Transfer Co.* 287
9. Generally, it is error to submit to the jury an issue not raised by the pleadings. *Connolly v. Providence Washington Ins. Co.* 303
10. Directing verdict for defendant where substantial evidence tends to support a verdict for plaintiff constitutes error. *Mussman v. Steele* 353
11. Questions of disputed facts are for the jury. *Standard Investment Co. v. Fisher* 394
12. Instructions must be considered together, and are sufficient if, when so considered, they properly state the law. *Casari v. Winchester* 463
13. Where the evidence is in conflict, question of fact is for jury. *Dworak v. Shire* 474
14. Whether a party may withdraw his rest and introduce further testimony rests within discretion of trial court. *Luikart v. Continental Nat. Bank* 598
15. Motion for a directed verdict admits all material and relevant evidence and proper inferences therefrom. *Luikart v. Continental Nat. Bank* 598

16. The trial court must instruct on issues raised by the pleadings and supported by evidence. *Brooks v. Thayer County* 610
17. Giving conflicting instructions *held* error. *Brooks v. Thayer County* 610

Trusts.

1. Testamentary trustees unreasonably delaying execution of trust *held* liable to the beneficiaries for resulting loss, including interest. *Burnham v. Bennison* 312
2. Whether a trust is created depends on language of instrument, donor's intention as disclosed by terms used, and the purpose sought to be accomplished. *Hobbs v. Board of Education* 416
3. Trustees converting or misapplying portion of funds of a charitable trust are not estopped from claiming the trust character of the remainder. *Hobbs v. Board of Education* 416
4. A trustee must exercise the care and diligence which would be pursued by a man of ordinary skill and prudence in the management of his own affairs, when making investments. *First Trust Co. v. Exchange Bank* 856

Vendor and Purchaser.

Pertinent recitals in a duly recorded deed or mortgage concerning the status and capacity of the parties, and the estate conveyed, are binding on the grantors and notice to those subsequently dealing with the title. *Old Line Ins. Co. v. Stark* 96

Waters.

1. A private property owner within a public power and irrigation district cannot complain that the district is without power to function until it obtained a grant of water rights, where grant, if necessary, could be subsequently acquired. *State, ex rel. Loseke, v. Fricke* 736
2. That a public power and irrigation district may injuriously affect municipal and private electric light and power plants *held* not to affect validity of act authorizing such districts. *State, ex rel. Loseke, v. Fricke* 736

Wills.

1. Right of childless devisee to mortgage land willed to him in fee *held* not defeated by a later provision in the will. *Ackmann v. Ackmann* 89

2. A latent ambiguity arises when a will contains an erroneous description of a legatee. *Burnham v. Bennison* 312
3. Extrinsic evidence is admissible to disclose and remove latent ambiguities in a will. *Burnham v. Bennison*..... 312
4. A latent ambiguity in a will consisting of an erroneous description of a legatee will not avoid the legacy if the description can be struck out and from the remaining portion, together with extrinsic evidence, the intended beneficiary clearly appears. *Burnham v. Bennison*..... 312
5. Where a legacy was made to one named and described by relationship on condition that he appear and make proof of his identity within a time limited, and no person as described ever existed, and the person named was the one intended, *held* that "identity" did not mean "relationship," and that testator did not intend that legatee should establish the given relationship as a condition precedent to receipt of legacy. *Burnham v. Bennison*..... 312
6. Claimants suing to enforce a legacy under one section of a will *held* not entitled to resist an intervener's claim under a separate section. *Burnham v. Bennison* 312
7. Beneficiaries of a testamentary trust required to appear and make proof to trustees within a time specified as a condition to receipt of legacy could not be defeated by fraud of trustees. *Burnham v. Bennison* 312
8. In proceeding to probate carbon copy of purported will, evidence *held* to establish that deceased left no will. *In re Estate of Crosby*..... 509
9. Assignment of interest in an estate procured by fraud will be set aside. *Branham v. Ayers*..... 688

Witnesses.

1. Failure to make proper objection to testimony of a witness known to be disqualified under statute waives the right to exclude his testimony. *Perry v. Neel*..... 106
2. When an attorney is a witness for his client except as to formal matters, he should leave the trial of the cause to other counsel. *Kausgaard v. Endres*..... 129
3. Permitting attorney for prosecution to participate actively in the trial after he had testified as to material matters *held* error. *Kausgaard v. Endres*..... 129
4. A party calling a witness because of his statements before trial favorable to the party should be permitted

to show such statements to repair damage caused by witness' testimony against him. *Stanley v. Sun Ins. Office* 205
5. A party should be permitted to interrogate his witness as to inconsistent statements. *Stanley v. Sun Ins. Office* 205
6. A party should be permitted to show inconsistent statements of his witness for the purpose of showing the circumstances which induced him to call him. *Stanley v. Sun Ins. Office* 205
7. Admission made by party which is inconsistent with his testimony goes merely to his credibility as witness. *Dillon v. Sears-Roebuck Co* 357
8. Claimant's testimony that she loaned money to decedent for purchase of realty *held* inadmissible because relating to transaction with decedent. *Tyler v. Estate of McDougal* 534
9. Evidence relating to conversation between deceased and a third person regarding a claim is admissible, but claimant who participated therein is barred from testifying to any part thereof. *Tyler v. Estate of McDougal* 534
10. Claimant *held* incompetent to testify regarding services rendered decedent. *Hansen v. Estate of McDougal* 538
11. Letter to receiver of insolvent bank suing on an account stated *held* properly received in evidence. *Luikart v. Continental Nat. Bank* 598
12. A litigant may cross-examine a witness only as to matters testified to in his direct examination; if he wishes to examine him as to other matters, he must make the witness his own. *Brooks v. Thayer County* 610